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SEPTEMBER, 1936

NO. 9

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By THURLOW M. GORDON

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AMERICAN BAR ASSOCIATION JOURNAL

VOL. XXII

SEPTEMBER, 1936

No. 9

• *Current Events* •

Colorado, Kansas, New Mexico and Wyoming Enter Compact Affecting Interstate Aspects of Crime

AN interstate compact which makes definite provision for the arrest of fugitives in other compacting states by the officers of the state from which they have fled, for the attendance of witnesses in criminal cases, and for reciprocal action in supervising probationers and parolees was entered into at Denver, Colorado, on July 6th by the states of Colorado, Kansas, New Mexico and Wyoming. Under the enabling acts of the compacting states the compact must be ratified by the several legislatures before it can become formally effective.

Paul P. Prosser, who was until his recent death the Attorney General of Colorado, had been active in furthering this cause, negotiations for which were carried on by Norris C. Bakke, Deputy Attorney General of Colorado. Attending the conference which resulted in the document were Honorable Clarence V. Beck, Attorney General of Kansas, Honorable Frank H. Patton, Attorney General of New Mexico, Honorable Ray E. Lee, Attorney General of Wyoming, Honorable Byron G. Rogers, Attorney General of Colorado, and Norris C. Bakke. The Conference was assisted by Charles H. Queary, Director of the Colorado State Legislative Reference Bureau and Miss Clair T. Sipel, Secretary of that Bureau. Mr. John R. Burroughs, represented Justin Miller of the United States Attorney General's office.

The compact was entered into to take advantage of the Act passed by Con-

gress in 1934 which gives consent to any two or more states who desire to enter into "agreements or compacts for cooperative effort and mutual assistance in the prevention of crime."

The first section of the compact dealing with "Arrest of Persons Who Have Committed a Felony or Who Are Fugitives from Justice" provides that any state, county, or municipal peace officer of a compacting state may enter any or all of the other compacting states without interference while pursuing a felon, one charged with a felony, or a person who has escaped from a peace officer or a penal institution. Furthermore the officer may take the person or persons he is pursuing into custody and for that purpose no formalities are required other than establishing the authority of the arresting officer. The officer is also to have his right to the custody of the person he has pursued recognized by the courts and officers of the state in which he makes the arrest and he is to be given the use of the state or county penal institutions for temporary lodging of his prisoner or prisoners. In all respects the officer from without the state is to be treated so far as the person in his custody is concerned as if he were a duly constituted officer of the state where the arrest is made, or through which the prisoner is being transported.

An important innovation is the provision concerning waiver of extradition as follows:

"All legal requirements to obtain extradition of any person who has com-

mitted a felony in said State, or who is a fugitive from justice as herein designated, arrested under conditions herein specified, are hereby expressly waived by the compacting states, and said duly constituted officer shall be permitted to transport said prisoner through any and all States, parties to this Compact, without interference whatsoever."

In the section on "Attendance of Witnesses" the compact provides that, in the event that any person in a compacting state is wanted as a witness in a criminal trial in one of the other states, the courts and court officials of the state where the witness is are to recognize as valid any subpoena, summons, or court order issued in accordance with the law of the state where the trial is to be had. The witness is to be paid compensation and mileage equal to that provided by law in the state requiring his attendance, and he is to be immune from service of civil or criminal process while in attendance at the trial and when enroute to or from the place he is to testify, as to all matters occurring prior thereto.

In the section on "Probation and Parole" judicial and administrative authorities are allowed to permit a parolee or probationer to reside in any of the other compacting states if the individual is a resident, or has his family within the other compacting state and can obtain employment there. In absence of these qualifications the individual may go to the other compacting state if it consents to his being sent there. In the event that the parolee or probationer goes to another state he is to be given the same supervision as

that state accords its own offenders who are on probation, parole, or under a suspended sentence.

The officers of the compacting states are at all times allowed to enter the other states and retake those on parole or probation from their state and this without formality except to establish the authority of the officer and the identity of the officer and the identity of the person to be retaken. All former legal requirements on extradition of such persons are waived by the compacting states. If the parolee, probationer, or recipient of a suspended sentence has committed or is charged with a crime in the state to which he has

gone, then he may not be retaken without consent of that state until after discharge from prosecution or imprisonment for his latter offense.

The compact provides that the governors of the compacting states are to appoint their Attorney Generals to act jointly in drawing up rules and regulations necessary to make effective the document. After ratification the compact is to continue in force and binding on each ratifying state until renounced by it. Renunciation is to be by the same authority that ratified the compact and ninety day notice in writing is to be given to the governor of each compacting state of intention to withdraw.

could be done, but also, as regards the more elementary procedures, to familiarize themselves with the actual detailed methods to be used, in order that they themselves could utilize them rather than depend upon the unpredictable efforts of their local law enforcement offices.

Although the subject of scientific crime detection attracted the chief interest of the attendants, the various topics of a strictly legal or administrative nature were given much attention. Also, the discussions of the prosecutors themselves and their exchange of ideas and opinions seemed to be of considerable value.

Contrary to the general notion that prosecuting attorneys consider their office merely as a training school for subsequent private practice or as a political stepping stone, there appeared every indication that at least the majority of this particular group considered it in a different light. They seemed to adopt a genuine professional attitude concerning the office, and many expressed the opinion that with the removal of certain objectionable features, such as inadequate compensation (in some instances as low as \$600 a year), and the consequent necessity for concurrent private practice, and the adoption of certain minor reforms, the office of prosecuting attorney could be transformed into a very attractive position for competent members of the legal profession who would be willing and anxious to prepare themselves as specialists in the field of criminal prosecution, as well as in criminal investigation insofar as practicable. This seems to be

Thirty Eight Prosecutors from Twelve States Assemble at Law School of Northwestern University to Take Course—Subjects in Which Instruction Was Given

A UNIQUE and apparently a highly successful experiment has just been concluded at Northwestern University School of Law, in the form of "A Course or Seminar for Prosecuting Attorneys." For many years the school has devoted considerable attention to the administration of criminal justice. In the establishment of its Scientific Crime Detection Laboratory, six years ago, it went a step further by attempting to promote the utilization of scientific methods in criminal investigation. Recently its activities in the field of administration as well as in that of criminal investigation were extended to include a course for Prosecuting Attorneys.

The object of this course, or seminar, was to gather together a number of prosecuting attorneys for the purpose of permitting them to avail themselves of all the Law School's facilities pertaining to criminal investigation and prosecution, and at the same time to permit an exchange of ideas and opinions among the attendants themselves.

A group of thirty-eight prosecutors from twelve states assembled at the Law School and the Laboratory during the five day period from August 3rd to August 7th to participate in this novel program—conceived and begun more or less as an experiment, but culminating in a display of sufficient interest to justify its establishment as an annual institution. Three of the attendants came from Michigan, seven from Wisconsin, two from North Dakota, five from Ohio, four from Iowa, nine from Illinois, three from Indiana, and one each from New York, Louisiana, Florida, South Dakota, and Pennsylvania.

Apart from the significance of the

number of attending prosecuting attorneys and the wide range of territory represented, the interest displayed by the group throughout the entire program clearly demonstrated the desirability as well as the need for a course, or seminar, of this nature.

The majority of the attendants, and particularly those from relatively small communities, indicated that it frequently becomes necessary for them personally to conduct criminal investigations, principally because of the inefficiency of local law enforcement agencies. This fact largely accounted for their interest in scientific methods of crime detection. They desired not only to know what



GROUP OF PROSECUTORS TAKING COURSE AT NORTHWESTERN UNIVERSITY

an idea deserving of serious consideration.

The curriculum consisted of two types of instruction and subjects for discussion: (1) A series of lectures and demonstrations by the staff members of the Scientific Crime Detection Laboratory concerning the various methods of scientific crime detection; (2) lectures (a) by other faculty members of the Law School who had specialized in certain phases of criminal law administration, and (b) by several other persons not associated with either the Law School or the Laboratory, but who were selected for the occasion because of their special qualifications in some particular phase of criminal prosecution and investigation.

The following subjects were presented by the staff of the Scientific Crime Detection Laboratory: "Firearms Identification," "Comparative Micrography" (by Charles M. Wilson), "Document Examination" (by Katherine Keeler), "Forensic Chemistry," "Medicolegal Problems," "Bombs and Explosions" (by C. W. Muehlberger), "Microanalysis," "Personal Identification," "Comparative Micrography" (by M. Edwin O'Neill), "Criminal Investigation," "Detection of Deception" (by Leonarde Keeler), "Legal Decisions on 'Fire Arms Identification,'" "Document Examination," "Forensic Chemistry," "Medicolegal Problems," "Microanalysis," "Personal Identification," "Comparative Micrography," "Detection of Deception," and "Photography," (by Fred E. Inbau).

Supplementary to this, each attendant received a copy of the Laboratory's "Outline of Scientific Criminal Investigation" (79 pages, lithoprinted); for use as an instructional guide and also as a source of future reference concerning the scientific principles and explanations of the various types of scientific evidence as well as their legal status and application. (The cost of this "Outline" was included in the nominal registration and tuition fee of ten dollars).

The subjects of "Fingerprints in Criminal Investigation" and "Photography of Crime Scenes," were discussed by Mr. T. P. Sullivan of the Illinois State Bureau of Criminal Identification and Investigation, and Lieutenant Edward F. Burke, formerly Chief of the Bureau of Identification of the Police Department of Rochester, New York.

Dean Emeritus John Henry Wigmore, Dean Leon Green, and Professor Newman Baker of the Law School, and Professor Earl H. DeLong of the Department of Political Science discussed the following subjects: "The Preparation of Evidence," "The Presentation of Evidence," "Some Modern Problems of Evidence" (by Mr. Wigmore), "The

Office of Prosecutor" (by Mr. Green), "Nolle Prosequi and Immunity Agreements," "Reversible Error in Criminal Cases," "Some Modern Reforms in Criminal Prosecution" (by Mr. Baker), "Administrative Aspects of the Office of Prosecuting Attorney," and "State Department of Justice" (by Mr. DeLong).

Following is a list of those taking the course:

Alvin F. Weichel, Sandusky, Ohio; Russell W. Keeney, Wheaton, Ill.; T. W. Foley, Superior, Wis.; Jacob A. Fessler, Sheboygan, Wis.; David L. Brunstrom, Jamestown, N. Y.; Arthur B. Wilkins, Alpena, Mich.; Lyall T. Beggs, Madison, Wis.; Oscar M. Edwards, Racine, Wis.; Lynn W. Ferris, Mount Pleasant, Mich.; Robert F. Jones, Lima, Ohio; Clarence G. Higi, Muncie, Ind.; Ralph F. Croal, Fargo, N. Dak.; W. O. Coleman, Asst. U. S. Attorney, New Orleans, La.; George W. Howard, Jr., Mount Vernon, Ill.; Elliot Walstead, Madison, Wis.; John W.

Coale, Taylorville, Ill.; S. J. Holderman, Morris, Ill.; A. R. Begesen, Fargo, N. Dak.; Charles W. Austin, St. John's, Mich.; John D. Germann, Jr., Monroe, Wis.; Burr H. Glenn, Huntington, Ind.; Allan A. Myers, Wheaton, Ill.; John B. Meister, Wauseon, Ohio; H. W. Markey, Huron, S. Dak.; Wm. A. Hallows, III, Jacksonville, Fla.; A. C. Carmichael, Pocatontas, Iowa; W. O. Weaver, Wapello, Iowa; Arno J. Miller, Portage, Wis.; W. R. Harris, Macomb, Ill.; C. G. L. Yearick, Columbus, Ohio; Jesse R. Willis, Bloomington, Ill.; Malachy A. Coghlan, Chicago, Ill.; Leon A. Grapes, Davenport, Iowa; Melton Boyd, Cambridge, Ohio; Nathan T. Elliff, Pekin, Ill.; Leon Schwartz, Wilkes-Barre, Pa.; Edgar A. Traeger, West Union, Iowa; Cecil F. Whitehead, Anderson, Ind.

FRED E. INBAU,

Assistant Professor of Law, Scientific Crime Detection Laboratory, Northwestern University School of Law.

Proposed New Constitution for Union of Socialist Soviet Republics Socializes Instruments of Production But Permits Limited Personal Ownership of Certain Property—Details

THE draft of the proposed new constitution for the Union of Soviet Socialist Republics which is scheduled to be submitted for consideration some time this Fall, is published in full in a recent issue of the New York Times. It is noteworthy for the civil liberties which it guarantees and the universal suffrage which it provides. The document is long (almost twice the length of the United States Constitution) and contains details which ordinarily one would not expect to find in a fundamental law; e. g., the "right to work" and the "right to rest." Freedom of speech and of the press are to be insured by the government furnishing paper, printing presses, public halls and the like to organizations of workers.

The first chapter in the document deals with "Social Organization." All power is declared to belong to the workers of the town and village in the form of soviets of the workers' deputies. The economic foundation of the U. S. S. R. consists in Socialist ownership of the implements and means of production which may either take the form of State ownership (public property) or of cooperative and collective farm ownership (property of individual collective farms and of cooperative associations). Some farms are owned by the State, hence are public property. State property includes the land, all

natural resources, factories, means of transportation and communication, some farms, as well as the essential part of housing. Livestock, implements, farm products, and public buildings are said to be the "socialist property" of the collective farm or cooperative on which they are situated. Each collective farm household is, in addition, to have a plot of land for its own use attached to it, and as individual property, a house, productive livestock and poultry and minor agricultural implements. The lands occupied by the collective farms are secured to them in perpetuity.

Alongside the predominant socialist system of economy small, private economy of individual peasants and handicraftsmen is permitted by law. This is to be based on individual labor and excludes the exploitation of the labor of others. Article Ten is sufficiently interesting to quote in full: "The personal ownership by citizens of their income from work and savings, home and auxiliary household economy, of objects of domestic and household economy as well as objects of personal use and comfort are protected by law."

Work is declared to be the obligation of every person capable of working on the principle that "He who does not work shall not eat."

Chapter Two is devoted to "State Organization." The various socialist

republics of the U. S. S. R. are named and their territorial make-up is set forth in detail. It is specifically provided that the Union is a voluntary association and that each republic retains its right freely to secede from it. The jurisdiction of the Union is said to extend to the usual questions of international relations, war and peace, money, national budget, and the like. The following matters are likewise expressly designated as the business of the Union as distinct from its constituent republics: establishment of national economic plans; administration of banks, industrial, and agricultural establishments as well as trading enterprises of all-Union importance; direction of the credit as well as the monetary system; establishment of principles for the use of lands and the exploitation of natural resources; education and public health; establishment of basic labor laws; legislation on judicature and legal procedure, civil and criminal codes.

Outside the matters specifically mentioned in the article covering these matters, each republic exercises its power independently. The constitutions of the republics are to conform to that of the Union. It is provided that if a republic law and an all-Union law differ the latter is to be operative.

Chapter Three is denominated "The Supreme Organ of the U. S. S. R." The supreme organ of the Union is declared to be the Supreme Council which is to exercise all the powers given to the central government as outlined above, except as to those to be administered by the organs of the Union subordinate to the Council, i. e., the Presidium of the Supreme Council, the Council of People's Commissars, and the People's Commissariats. The Supreme Council exercises the legislative power. It consists of two groups, a Council of the Union and the Council of Nationalities. The Council of Union is elected by citizens of the U. S. S. R. on the basis of one deputy per 300,000 population. The Council of Nationalities is made up of deputies representing the republics and provinces on the basis of ten deputies from each Union republic, five from each autonomous republic, and two from each autonomous province. The Supreme Council is elected for four years. Both houses have equal rights and each is free to initiate any type of legislative measure. A majority vote in each house is sufficient to approve a measure.

At a joint session the two chambers of the Supreme Council elect the Presidium of the Supreme Council consisting of a chairman, four vice-chairmen, a secretary and thirty-one members. The Presidium convenes the sessions of the Supreme Council, issues administrative orders, dissolves the Council and

orders a new election in case certain provided measures for agreement between the two houses fail. In general the Presidium exercises the function of the executive branch. In certain fields its powers are increased when the Supreme Council is not in session. One Presidium lasts until another has been duly formed after a new election of the Supreme Council.

Chapter Four deals briefly with the duties of the Supreme Councils in each of the Union Republics.

Chapter Five outlines the "Organs of Administration of U. S. S. R.," which consist of the Council of People's Commissars (formed by and responsible to the Supreme Council) and People's Commissariats. Chapter Six deals with similar bodies in the Union republics, and Chapters Seven and Eight with "Organs of Power" in the autonomous republics and in localities.

"Court and Prosecution" is taken up in Chapter Nine. A Supreme Court of the U. S. S. R., supreme courts in each republic, and province are designated to administer justice. Special courts may be created by the Supreme Council. The Supreme Court of the U. S. S. R. is charged with the supervision of all judicial organs in the U. S. S. R. and the Union republics. It is elected by the Supreme Council for a period of five years. The Supreme Court in each Union republic is elected by the Supreme Council of that republic for a five-year period, likewise in other republics and provinces. People's courts are elected by secret ballot (based on universal, direct and equal suffrage) for a period of three years.

Regulations concerning the courts provide that each is to conduct its proceedings in the language of the locality where it convenes, but one who does not speak or understand that language is to have his rights safeguarded. Cases are to be heard openly except when otherwise provided by law and an ac-

cused is insured the right of defense. Article 112 provides: "Judges are independent and subject only to law." The Prosecutor of the U. S. S. R. is charged with seeing that governmental groups obey the law. Local prosecutors are responsible to him alone.

Chapter Ten contains the "Bill of Rights" ("Citizens' Basic Rights and Obligations"). The right to work is guaranteed and, significantly, "the right to receive guaranteed work with payment for their work in accordance with its quantity and quality." Other rights mentioned include: the right to rest (annual vacations with pay), right to security in old age and in event of sickness and loss of capacity, right to education. Women are to have equal rights with men in every field. No discrimination on account of race or nationality is allowed. Freedom to perform religious rites and of anti-religious propaganda are both provided.

Article 125 contains guarantees of the freedom of speech, press, assembly and meetings and street processions and demonstrations. The government is to provide whatever is necessary to make these rights effective. The right of combining in organization trade unions, and other associations is guaranteed. Arrests may not be made without an order by a court or a prosecutor. The homes of the citizens and the secrecy of correspondence are protected by law.

Chapter Eleven goes into detail concerning the electoral system. All persons over 18 have the right to vote for and to be elected as deputies except mentally deficient and those deprived of the vote by the courts. Various groups can put forward candidates. Provisions for recall of deputies are to be provided.

Chapter Twelve deals with the state emblem, flag and capital.

Chapter Thirteen provides that the Constitution may be amended by a two-thirds vote in each chamber of the Supreme Council of the U. S. S. R.

Washington Letter Reports Prospective Compilation of Acts Which the Supreme Court Has Held Unconstitutional—Preparing to Enforce Robinson-Patman Act—Clarification of SEC Authority, Etc.

Washington, Aug. 18.

List of Unconstitutional Acts

THERE is to be printed in the near future the compilation of supposed laws which the Supreme Court has held unconstitutional. This is the study made by Mr. W. C. Gilbert, of the Legislative Reference Division of the Library of Congress, as mentioned in the Washington Letter to the Journal

about a year ago. It is being brought up to date and the compiler expects the copy to go to the printer during the latter part of August. The pamphlet, which may contain between 150 and 200 pages, will probably be available at the Government Printing Office for a small consideration.

The number to be printed cannot be ascertained at this time. The provi-

sion which Congress made for this edition is under the heading, Library of Congress, and merely says:

"For the printing and binding of a compilation containing the provisions of Federal laws held unconstitutional by the Supreme Court of the United States, to remain available during the fiscal year 1937, \$1,200."

The list in summary form of the Acts held unconstitutional was printed twice in the Congressional Record during the past session: on January 9, 1936, p. 263, showing 64 such Acts and on June 8, 1936, p. 9464, showing 70 instances wherein the Supreme Court has held congressional Acts unconstitutional. There was a summary, according to the number of Justices for and against each of the decisions, published in the Record of March 23, 1936, in connection with an address delivered by Senator Minton before the Federal Bar Association, Washington, D. C., which was placed in the appendix of the Record at p. 4402.

Preparation to Enforce Robinson-Patman Act

At a conference recently held between Attorney General Cummings, Assistant Attorney General John Dickinson, three members of the Federal Trade Commission, and others from the staffs of these two offices, policies of cooperative action were formulated between the Anti-Trust Division of the Department of Justice and the Federal Trade Commission for enforcement of the Robinson-Patman Act. Arrangements were made for consultation and cooperation by the Department of Justice with the Federal Trade Commission in investigations and other activities in order that the two agencies might agree upon common policies with reference to the Act and coordinate their functions in connection with its administration.

It would be useless to expect an authoritative explanation of this Act from the agencies charged with its enforcement, since the Clayton Act, which it amends, and which has been in effect since 1914, has not yet been fully clarified by the 38 court decisions, the amendment of 1925, and the various treatises that have been written on it. Moreover, it was deemed necessary in this new legislation to supplement also the Federal Trade Commission Act passed in the same year, 1914, and also amended in 1925. Even the Sherman Anti-Trust Act, which has been under exhaustive interpretation since its passage in 1890, seemed to require supplementing by these various later enactments.

It has been suggested that this newest of these five attempts at regulating economics may be held unconstitutional as

an invasion of the powers "reserved to the States respectively or to the people" and that it is more apparently so than was the N. R. A. The complementary query is, if the R-P. A. does not suffer the fate of the N. R. A., whether it will be the entering wedge whereby the federal Government may exercise still greater regulatory powers over all types of business?

Numerous questions are being asked about the Robinson-Patman Act; and even more numerous are the answers given to them. For example, is there criminality in the purported offense designated in the first provision of the penalty section (Sec. 3) of this Act, the provision which seeks to prohibit discriminating against a customer's competitors by giving him a discount, rebate, allowance, or advertising service charge which is not at the same time available to them? The other two offenses set forth in Sec. 3—the parts being separated by semicolons—include in their prescriptions the purpose of "destroying competition or eliminating a competitor." That is to say, may the mere act of discriminating be made a crime? 12 C. J. 929, Sec. 441, at note 21; 12 C. J. 1203, Sec. 971, at note 68.

How many of the numerous things which are declared unlawful by the first section of the Act (the one amending the Clayton Act, 15 U. S. C. A. Sec. 13) are effectively prohibited? There are no penalties prescribed in this part which ostensibly is the substantive portion of the Act. Section 3, which attempts to cover the subject of penalties, makes no definite reference to the earlier portions of the Act; but, on the contrary, is limited to persons "violating any of the provisions of this section."

Hence, the things inveighed against in the first section may not be punished under provisions of this Act unless they also come within the three cases of Sec. 3, viz.: (a) Discrimination against competitors of the customer (with the doubt of its effectiveness suggested in the second paragraph above); (b) Selling or contracting to sell goods in one locality at prices lower than they are sold elsewhere in the country "for the purpose of destroying competition, or eliminating a competitor"; or (c) Selling or contracting "to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." The prescribing of punishment is generally considered necessary in constituting a statutory crime. 16 C. J. 68, Sec. 30.

There might be cases where some of the things declared "unlawful" in the first section would be found along with a combination or conspiracy in restraint

of trade and therefore receive indirect punishment under the Sherman Anti-Trust Act, 15 U. S. C. A. Sec. 1. It is hardly reasonable that the threefold damages to the person injured (15 U. S. C. A. Sec. 15) would be considered as the requisite punishment to constitute the "unlawful" elements of the first section of the R-P. A. effective statutory crimes. Although 15 U. S. C. A. Secs. 21, 24, and 45, deal with situations which may result in punishment, they, of course, could not be considered as annexing punishment to the acts set forth in the R-P. A.'s first section.

One suggestion heard is that this Robinson-Patman Act is another attempt by Congress to circumvent the right of an accused person to have a trial by jury and to have the Government bear the burden of proving him guilty before he may be punished. 16 C. J. 528, Sec. 993. Subdivision (b) of the first section (designated in the pamphlet print as "Sec. 2" because it amends that section of the former law) of the Act places upon the accused "the burden of rebutting the prima facie case" which it presumes exists "upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished." See 12 C. J. 823, Sec. 285; 22 C. J. 68, Sec. 13, at note 41, and also Sec. 14.

If the "prima facie case" is not rebutted by "justification" "affirmatively shown, the Commission is authorized to issue an order terminating the discrimination." The order is made where, after a hearing, the Commission "shall be of the opinion" that the provisions of the law have been violated. 15 U. S. C. A. Sec. 21. And, upon appeal to the Circuit Court of Appeals, the findings of the Commission "as to the facts, if supported by testimony, shall be conclusive." *Id.* If the court's order is not obeyed, punishment for contempt, of course, would follow. Thus, by the instrumentality of a Commission, set up as a sort of spring-board, the citizen is forced to jump into court in such a manner as to deprive him of what once were supposed to be his inalienable constitutional rights.

Regardless of how the several elements of this Act eventually are construed by the courts, there are likely to be many businesses seriously concerned over the cost of defending their actions against accusations from Washington. And there may be more who will be squeezed out of profitable existence by the need of keeping more exhaustive accounting records in order to be able to defend in black and white their every step, such detailed records not being re-

quired in the particular case for any practical business reasons.

There is one broad view of this subject which asks whether our whole process of alleged anti-monopoly and anti-restraint-of-trade legislation, as it has developed, is not actually encouraging the concerted maintenance of uniform prices (which 90 per cent of the time means uniformly high prices) by the group already in an industry, and therefore really is pro-monopoly, in its major effect. Is not that the inevitable result of any mechanism, whatever its pretenses, which stifles the most effective element of competition, that is, price cutting? If it is stifled under the guise of preventing monopoly, that makes no difference in the absolute effect of the stifling.

Whether it would be possible to establish live and let live laws on any other basis than that which we have been trying out for the last four or five decades is not explained by the suggesters of the above view. But this, they say, is elemental: that for a powerful operator in any industry to cut prices unduly in the locality of his small competitor in order to drive the latter out of business so that he may have the whole field to himself is a monopolistic practice; whereas for the small operator—being willing to work harder and to be satisfied with less profit—to cut prices temporarily in order to get a part of the business which has been going to his powerful opponent, provided in the long run he succeeds, is the exact opposite of monopolistic.

Those who hold the above-indicated view summarize thus: If the elemental proposition stated is true, can any method, whereby we may attempt to curb monopolies, succeed without taking account of it, i. e., by establishing rules definitely favoring the smaller or weaker members in any group of competitors?

Some of the results of the Robinson-Patman Act which have been suggested are:

That there will be abandoned special commissions, allowances, and favors to customers, unless in proportion to differences in sales costs or quantity production;

There will be encouragement of private brands with separate specifications in order to avoid the regulations;

There will be a larger amount of manufacturing on the part of chain stores themselves;

The making of price agreements between producers will be resumed, if the previous ideas of enforcement of the anti-trust laws should be liberalized so as to permit it;

Manufacturers will concentrate more on certain classifications of buyers;

Government supervision will be increased to cover more and more trade details;

The doing of business in only one State and the establishment by the larger organizations of subsidiaries in many states;

Selling through contracts which do not specify quantities;

More memberships in trade associations and more work for cost accountants;

The growth of co-operative associations;

Prolonged uncertainty as to how the Federal Trade Commission will construe many features of the law, and much discussion as to its constitutionality; and

More favorable prices to independent buyers in large quantities which previously have been hindered by rigid trade arrangements.

Public Debt Recedes

The first month of the Government's fiscal year 1937, viz., July, 1936, saw a slight decrease in the national debt, that is, a payment thereof to the extent of \$34,748,256. This was by reason of the cash redemption of bonds issued to the veterans. Thereafter the debt was \$33,443,795,237. A year ago it was \$29,119,769,527.

Repayments of loans to a number of the federal agencies caused the net expenditures to be substantially less than in the same month last year. Such repayments during July of 1936 totaled \$249,570,114 and were made to the A. A. A., the Commodity Credit Corporation, the Farm Credit Administration, and the R. F. C. Total Government expenditures for the month of July, this year were \$417,108,643 as against \$727,535,077 for the corresponding month last year.

Voluntary Cooperation of Industries

Through encouragement by the Federal Trade Commission, and after conferences held thereon, a substantial number of industries have submitted to voluntary self regulation through the adoption of trade practice rules which are approved by the Commission. It has been stated that none of these permit price fixing and that they do not relate to wages or conditions of labor.

The eight industries now operating with such understanding—most of the systems of rules being very recently made public—are: the wholesale tobacco trade; fire extinguishing appliance manufacturing industry; vegetable ivory button manufacturing; paper drinking

straw manufacturing; buff and polishing wheel industry; cotton converting; flat glass; and juvenile wheel goods manufacturing. Approximately 30 other industries have filed applications for trade conferences. This plan has been in operation through the Commission since 1919; and, in all, 175 trade practice conferences have been held.

Some of the practices which have been declared unfair are:

Imitation of trade-marks, trade names or other exclusively-owned marks of identification of competitors; and false and deceptive marking or branding of products;

Publishing or circulating misleading price quotations;

Falsifying invoices;

Circulating threats of suit for infringement of patents or trade-marks among customers of a competitor, unless made in good faith;

Selling goods below cost;

Making or publishing false or deceptive statements with regard to the nature of any industry product;

Defaming competitors;

Giving money or anything of value to agents or employees of customers without the knowledge of employers or principals as inducement to influence their employers or principals to purchase products from such industry members.

All the systems of trade practice rules:

Denounce the willful inducement to breach of contract between competitors; and

The secret allowance of rebates, refunds and discounts; and

Prohibit price discrimination contrary to Sec. 2 of the Clayton Act; or, as to those recently adopted, that section as amended by the Robinson-Patman Act.

Authority of S. E. C. Being Clarified

The registrant with the Securities and Exchange Commission does not have an unlimited right to withdraw his registration statement says the S. E. C. in an opinion just released. A statement was permitted to be withdrawn in the case of *Jones v. Securities and Exchange Commission*, 80 S. Ct. 655, which was decided April 6, 1936; but the Commission distinguishes the present situation from that one.

The statement, in the case on which the recent ruling was based, had become effective two years previously. The Commission had begun a stop-order proceeding and was conducting a hearing thereon. The registrant contended that this hearing, if not terminated, would

(Continued on page 651)

ROBINSON-PATMAN ANTI-DISCRIMINATION ACT— THE MEANING OF SECTIONS 1 AND 3

Measure Intended to Strengthen Prohibitions against Price Discrimination Originally Contained in Section 2 of Clayton Act—Both Sections Prohibit This Practice, One from the Civil and the Other from the Criminal Standpoint—Whether They Cover Substantially the Same Ground Is One of the Major Problems of the Act—Consideration of Detailed Provisions, with Comments Thereon—Judicial Interpretation Needed, Etc.*

By THURLOW M. GORDON
Member of the New York Bar

ANY careful lawyer asked to give an opinion as to the meaning of the Robinson-Patman Act must necessarily approach the problem with trepidation and dismay. Never in the history of Federal legislation, so far as I can recall, has an important statute, intended to affect business in a fundamental way, been passed with so little real consideration or in so utterly incomprehensible a form.

I am speaking not from the standpoint of one who is opposed to legislation of this character. On the contrary, I have much sympathy with its general purpose. But even those who are sincerely desirous of reaching a reasonable and working construction of the Act (and not merely to make refined and captious objections to it) will be appalled at the difficulties which this Act presents.

It has been said of other laws that they contain a lawsuit in every line—but this contains a lawsuit in literally every word.

Nevertheless, we are confronted by an actual situation—and as practical men it is necessary to try as best we can to work out a course of conduct which will enable us to live within the four corners of the law.

It is only fair to me, however, to have it understood that anything I say is not in the nature of a considered and final opinion. No such opinion can be given until more time has elapsed and more study can be given. The intricacies of this law, and the permutations and combinations of factors in the different situations with which it deals, are such that new angles are presented daily which affect the views of those who are studying the problem.

Neither should any one take anything that I may say as a basis for determining the legality of his own contracts or policies. If you have such problems you should consult your own counsel. The question of legality in specific cases will depend upon all of the surrounding facts and circumstances and cannot be determined on the basis of general, hypothetical questions.

I hope that anything I say may be regarded—as I myself regard it—rather as a tentative expression of how I now think the Act may be construed—as a contribution to promote discussion—and with no assurance that these present views are correct or that they will not be changed tomorrow.

*Reprinted from proceedings of a Conference held by Trade Association Executives in New York on the Robinson-Patman Anti-Discrimination Act, at the Hotel Pennsylvania, Wednesday, July 8, 1936.

Moreover, the complexities of the Act are such that it is impossible within the space of time allotted at such a gathering to discuss it in anything but a very superficial way. Perhaps that is fortunate for me because the most serious difficulties appear only when we depart from the language of the Act itself and attempt to apply its smooth sounding generalities to the specific processes by which business is actually carried on.

The Robinson-Patman Act was intended to strengthen the prohibitions against price discrimination originally contained in Section 2 of the Clayton Act.

It originated primarily out of a desire to prevent chain stores and other large buyers from securing excessive advantages in buying over their smaller competitors by virtue of their mere size and purchasing power. But its language is much broader than that.

For the purpose of this discussion I shall ignore everything in the Act but Section 1 (amending Section 2 of the Clayton Act) and Section 3.

Both of these sections prohibit price discrimination—one from the civil and the other from the criminal standpoint. Whether they are to be treated as covering substantially the same ground or as wholly independent, is one of the major problems of the Act.

I

SECTION 1

1. Discrimination in Price under Subsection (a).

Section 1(a) prohibits "discrimination" in price.

The question immediately arises what is "price" and what is "discrimination."

It is thought that price within the meaning of the Act means the net price after discounts and similar allowances. Apparently it does not comprehend all terms of sale—for the words "or terms of sale" which were in the Bill as it passed the Senate, were stricken out by the Conference Committee, with the explanatory statement¹ that

"The managers were of the opinion that the bill should be inapplicable to terms of sale except as they amount in effect to indirect discriminations in price within the meaning of the remainder of sub-section (a)."

Congress also deliberately rejected the attempt to use the definition of the word "price" as an indirect method of prohibiting the use of basing points or delivered prices. Subsection 5 of Section 2 of the Patman

1. Statement of the Managers on the Part of the House, attached to the Conference Report page 5.

Bill as reported in the House defined price as meaning "the amount received . . . after deducting actual freight or cost of other transportation." This was in reality an attempt to compel the seller to quote F. O. B. point of shipment—and to get the same net at the mill regardless of the market in which the goods were sold. It provoked great opposition—particularly among farm leaders. It was stricken out by the unanimous vote of the House Judiciary Committee with the statement that otherwise the bill could not be passed.²

"Discrimination" as used in the Act, means more than mere "difference" or "variation" in price. It involves the existence of some relationship which entitles the customers in question to be treated alike. Representative Utterback in explaining the term "discrimination" before the House said:

"In its meaning as simple English a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that *some relationship exists between the parties to the discrimination which entitles them to equal treatment*, whereby the difference granted to one casts some burden or disadvantage upon the other. *If the two are competing in the resale of the goods concerned, that relationship exists.* Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination". (Cong. R., p. 9559.)

Not every discrimination between competitors violates subsection (a)—but only those where "the effect may be"

1. "Substantially to lessen competition",
2. "To tend to create a monopoly", or
3. "To injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them".

The expressions "substantially lessen competition" or "tend to create a monopoly" are familiar in the anti-trust laws. They were in the original Clayton Act and while no one can say precisely what they mean, they at least connote some fairly serious effect on competition generally, rather than what Mr. Justice Holmes has called "the small dishonesties of trade," affecting only the individuals immediately concerned. They have been applied in relatively few cases and perhaps for that reason have caused no very serious trouble.³

The expression, in the third clause, "to injure, destroy or prevent competition with any person" is wholly new to the anti-trust laws. It is the very heart of the new law and was intended by its sponsors to have a much more drastic meaning than the old.

The test apparently may be that of injury to the competitive equality of a single individual—not to competition generally. Moreover, that individual may

be either a competitor of the seller, or a customer of the seller, or a customer of a customer.⁴

Apparently its sponsors intended it to mean that every competitor in the same class, under similar circumstances and conditions must receive the same price. If that is so—if every price discrimination is prohibited (unless protected by one of the exceptions or justifications hereinafter referred to) then the Act is certainly of sweeping and revolutionary effect.

It wipes out "individual higgling" and substitutes the "mass bargaining" to which the Government so strongly objected in the *Sugar Case*.⁵

It practically imposes by law the same obligation not to discriminate between customers which the Supreme Court in the *Sugar Case* said that sellers could not impose upon themselves by voluntary agreement.

It imposes on industry generally a sort of common carrier obligation hitherto reserved for those industries which are clothed with a public interest.

It makes it difficult, if not impossible, to vary prices except by classes, upon a general scale—and where lower competitive prices exist in a particular market, it permits special, as distinguished from general, reductions to meet such lower prices only to the extent necessary to "meet" and not to go below them.

Thus, it tends to compel by law the same "rigidities" that were so much objected to by critics of the NRA.

It also tends to compel those price "uniformities" which have been the subject of recent attack by government authorities.

This tendency toward price stabilization may be a very desirable thing from the economic standpoint. It was very earnestly and sincerely so contended in the *Sugar Case*. But in fairness to industry—and for its protection against criticism and attack—it should be understood that this will be the inevitable result of the obligations imposed by the Robinson-Patman Act.

The businessman is on the horns of a dilemma. If he deviates from his price, he will be charged with "discrimination" in violation of the Robinson-Patman Act. If he does not deviate from it—and if others are forced by competition to bring their prices down to the same level and do not deviate from their prices either—he may be charged with "uniformity" and price fixing in violation of the Sherman Act.

Against the foregoing it may be argued strongly that even under the new language of Section 1—"where the effect may be . . . to injure, destroy or prevent competition with any person"—the courts will not give the Act a meaning so drastic as that suggested. It may be argued that the Act originated primarily out of a desire to prevent chain stores and other large buyers from securing excessive and unconscionable advantages in buying over their small competitors; that the legislators had in mind transactions of considerable magnitude; and that not every price discrimination, however slight—by an insignificant seller as between two insignificant competitors—would injure or affect competition between them in any substantial way or have any dangerous probability of doing so. It may also be argued that a single sporadic act of discrimina-

4. It is not clear what effect should be given to the word "knowingly" in this particular provision. Literally, the effect would seem to be that, a discrimination even though clearly injurious to the competitors of a customer—or of a customer's customer—is only illegal if the customer himself knew that he was receiving a discrimination.

5. *Sugar Institute, Inc. v. United States*, 56 S. Ct. 629 (1936).

2. See Statements by Representative Patman, Cong. R. 7970; Boileau, Cong. R. 8343; Crawford & Miller, Cong. R. 8347; Ramspect, Cong. R. 3347; Robinson, Cong. 8486. Senators Borah and Van Nuys agreed that the bill had no effect on basing points, Cong. R. 10018. For a very well reasoned statement of the reasons why one of the Judiciary Committee members opposed this "anti basing point" provision, see the speech of Congressman Citron, Cong. R. 8434-7.

3. See *George Van Camp & Sons v. American Can Co.*, 278 U. S. 245 (1928); *American Can Co. v. Ladoga Can Co.* 44 F(2d) 763 (C.C.A. 7th, 1930) cert. den. 282 U. S. 899 (1931); *Porto Rican American Tobacco v. American Tobacco Co.*, 30 F(2d) 234 (C.C.A. 2d, 1929); *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 224 Fed. 566, 572 (S.D.N.Y. 1915); 227 Fed. 46 (C.C.A. 2d, 1915).

tion is not sufficient—that the injury must be continuing or recurrent.

On the other hand it may be replied that the legislators believed that the language of the original Clayton Act had proved ineffective because it did not go far enough. For that reason they passed the Robinson-Patman Act. They wanted, so far as they could, to compel equality of price to all competitors under like circumstances. The new language is the very heart of that Act and must be given an interpretation calculated to carry out its purpose.

As between these two interpretations the position of the businessman is exceedingly difficult. How is he to define the extent to which he may discriminate without attaining the prohibited degree of injury? The test is one so difficult of application that the wiser policy will be to avoid trouble by avoiding price variations altogether except as they come within the recognized exceptions hereinafter referred to.

2. Exceptions to the General Prohibition against Discrimination in Section 1

The sweeping character of the obligation not to discriminate is subject to a number of very important exceptions.

In considering these exceptions it should be noted, however, that under Section 1(b) the mere showing of a discrimination in price or services or facilities constitutes a *prima facie* case of violation of the law and that

"the burden of proof of rebutting such a *prima facie* case thus made by showing justification shall be upon the person charged with the violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination."

In terms this presumption seems to apply only in a "hearing on a complaint" before the Federal Trade Commission, but in practical effect a court would be very likely to follow the same rule.

(a) Competition

In the first place, discrimination, to be unlawful under most of the provisions of the Act, must affect competitors. Where competition is not affected, differences in price are not forbidden by the Act. The language of Sections 2(c) and 2(e), however, raises a question as to whether the discriminations prohibited in these subsections must affect competitors in order to be unlawful.

(b) The Right to Refuse to Sell

In the second place, there is nothing in the Act to prevent a seller from discriminating against any particular customer or class of customers by refusing to sell them altogether. He may decide to sell only to one or more chain stores or other large volume customers and refuse to sell to small retailers at all. Section 1(a) expressly provides that nothing therein shall prevent sellers

"from selecting their own customers in bona fide transactions and not in restraint of trade."

Congressman Utterback stated that even this right was not absolute, however, and that while a seller might refuse to deal with a certain customer altogether—for credit reasons or because he did not like his business methods—he could not accept him as a customer for some classes of goods and then discriminate against

him by refusing to sell him others—while selling on favorable terms to someone else. (Cong. R. 9560). It is doubtful whether the right to refuse to sell is subject to any such limitation.⁶

On the other hand, it is of course clear that a seller would not be protected by this exception if he did not refuse to sell to a particular customer altogether but merely refused to sell to him except on discriminatory terms.

(c) Grade and Quality Differentials

A discrimination—in order to violate the act—must be in respect of "commodities of like grade and quality." This preserves to the seller the right to grade his products; to establish differentials for different grades; to sell sub-standard goods at a discount, etc.

This exception, however, cannot be used as a mere subterfuge to defeat the Act. Differences in grade and quality must be substantial and established in good faith if discriminations are to be justified.

This raises serious questions of fact and law as to the so-called "branded goods"—especially where goods of standard character are given special brand names when sold to chain stores or mail order houses.

(d) Method and Quality Differentials

Subsection (a) specifically provides that differentials are not prohibited which make

"only *due* allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantity in which commodities are to such purchasers sold or delivered."

It is clear, therefore, that quantity discounts and discounts based on differing methods of sale or delivery are permitted.

Such differentials, however, must make "*only due* allowances for differences in the cost." What is "*due*" and what is "*cost*?"

Literally construed such differentials might seem to be confined to not more than the exact difference between the unit costs of individual sales. Such a standard would be impracticable. The determination of cost in the case of a particular grade of a particular commodity is always very difficult—as the NRA discovered in trying to prohibit sales below cost. The determination *in advance* of the exact difference in the cost of numerous individual sales, made from time to time, in differing quantities, for delivery over different periods, is utterly impossible.

I believe that the words "only *due*" will have to be given a reasonable and practical construction and where actual differences exist the seller will not be required to weigh those differences with diamond scales. Reasonable latitude in determining the differentials will be allowed—and great weight will be accorded to the custom of the industry in such matters.

Even a liberal construction of the requirements as to cost will probably require careful scrutiny of the amounts allowed as quantity differentials in many cases.

It is not clear whether in computing the difference in cost of differing "*methods*" of sale a buyer whose sales do not require solicitation could be relieved of any part of the general sales expense. It seems probable that he would not have to bear this expense, although the debates are not clear.

On the other hand, it also seems probable that in determining quantity discounts it would not be proper to treat a sale to a particular customer as purely "in-

6. See *U. S. v. Colgate & Co.*, 250 U. S. 300; *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (C.C.A. 2nd, 1915).

7. This limitation on the amount of quantity discounts is not in terms applicable to Section 3.

crement tonnage" and to accord to it a price differential based solely on the added factory cost of that particular sale without including any of the general overhead. (Statement of Representative Utterback, Cong. R. 9560; Report of Senate Judiciary Committee, S. R. No. 1502, p. 5).

The old question whether quantity differentials should be based solely on the quantity taken in each specific sale—rather than on total purchases over a period—has never been finally settled and is not specifically treated in Section 1 of the Act.⁸

In order to limit the advantages flowing to mass purchasers by reason of their mere size, the Federal Trade Commission is given power to impose quantity limits beyond which further increase in quantity may not be made the basis for additional quantity discounts. As to this provision it should be noted

1. The Commission can only fix the quantity limits—not the amount of the price differentials.
2. There is no quantity limit until the Commission has actually fixed one.
3. It applies only where "available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly."

Considerable doubt exists as to whether the standard for the delegation of power to the Commission is sufficiently definite—under the *Schechter* case, 295 U. S. 495, the *Panama Refining* case, 293 U. S. 388, and other recent decisions of the Supreme Court.

(e) Functional Differentials

It is believed that functional differentials, such as those to manufacturers, wholesalers and retailers, may still be allowed under the Act. This is a controversial question, however, and there is much difference of opinion among lawyers on the point.

It is true that functional differentials are not expressly authorized as an exception. Neither were they expressly authorized under the original form of Section 2 of the Clayton Act. That section has always been construed as permitting them, however. *National Biscuit Co. v. F. T. C.*, 299 Fed. 733 (C. C. A. 2d, 1924), cert. den. 266 U. S. 613 (1924); *Mennen Co. v. F. T. C.*, 288 Fed. 774 (C. C. A. 2d, 1923), cert. den. 262 U. S. 759 (1923).

This Act must be presumed to have been reenacted in the light of that long established construction.

From time immemorial such discounts have always been regarded as proper. Nor have such differentials, of themselves, ever been regarded as giving rise to monopoly or other public injury. Wholesalers are not considered competitors of retailers—at least not in such a sense that a price differential between them could be regarded as an unfair or undue discrimination.

The situation comes directly within the language used by Mr. Utterback, quoted above, when he was discussing the meaning of the word "discrimination." No such relationship exists between wholesalers and retailers as, in the generally accepted opinion of business men, entitles them to equal treatment as to price. Indeed the consensus of opinion among merchants would be exactly the contrary.

Certainly the courts will not presume that such a fundamental change in the historic system of market-

⁸ From the slightly different language of Section 3, it might be argued that under that Section the specific sale is the basis.

ing throughout this and other countries was intended in the absence of very explicit and compelling language—especially where, as here, no indication of any such intention was ever expressed either in the reports to Congress accompanying the Act or during the debates.

The fact that a very unsatisfactory provision expressly authorizing functional differentials was stricken from the bill is immaterial. It was unnecessary. The wholesalers and retailers who were active in securing the passage of the Act would be much surprised to discover that they legislated their own discounts out of existence.

Neither does it seem reasonable to construe the prohibition of subsection (d) against allowances for services as preventing functional discounts. Subsection (d) was aimed at quite a different thing.

The confusion over this question arises in part because of the insertion of the words "or with customers of either of them" in that portion of the Act which prohibits discrimination

"where the effect * * * may be * * * to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

It is argued that where a manufacturer gives one price to a wholesaler and substantially the same price to a chain store, the small retailers who are customers of the wholesaler will not be able to compete with the chain store because of the price differential. If, however, the chain store receives no more than a proper quantity discount over and above the ordinary retail discount, it is hard to see how the small retailers have any cause of complaint.

It would seem to give the words "or with customers of either of them" a sensible meaning if they were confined to competition of the customers of the wholesalers as a class and competition between the customers of the retailers as a class and were treated as giving a cause of action even to those who do not deal directly with the giver of the discrimination.

Whether a chain store or a cooperative association is to be treated as a wholesaler or a retailer—and how cases will be handled where the same buyer occupies a dual function—are questions not expressly dealt with by the Act. Such questions will present great difficulty. It may be possible in some cases for manufacturers to put all their customers upon a single price basis. In others, it may be possible to give the wholesale price on goods intended to be used in the buyer's wholesale business and the retail price on goods to be used in his retail business. The seller will have to determine, at his peril, whether a particular buyer is as a matter of fact a wholesaler or a retailer.

(f) Other Classifications of Customers

There may be other classifications of customers which are customary and non-competitive—and would not be within the spirit of the prohibitions of the Act.

Government agencies, for example, will doubtless claim that they are not in competition with private customers and may properly be put in a class by themselves, though there may be cases in which competition does in fact exist.

Differentials may be justified also between other non-competing classes of consumers—such as users of chemicals for industrial and for fertilizer purposes.

Doubtless other reasonable classifications may exist but caution will have to be exercised to be sure

that any such classifications are thoroughly justified and not mere pretexts for discrimination.

One can hardly venture to predict at this moment whether there might be any circumstances under which separate classifications—other than quantity discounts—might be set up for chain stores, department stores, mail order houses, cooperatives, or other large buyers.

(g) Changing Conditions

Obviously, if every change in price constituted discrimination, even general changes either to higher or lower price levels could not be safely made, especially if long term contracts at the old prices were outstanding. Industry would be in a strait jacket. Accordingly, subsection (a) provided that

"nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonable goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

This exception would seem clearly to justify temporary price changes where necessary to move an oversupply of goods which may deteriorate or become obsolete.

It may be argued with much force that this provision also permits deliveries under a long term contract where the market price for new business has either risen or fallen after the contract was entered into. If it is not so justified then it is submitted that a difference in price between deliveries taking place at the same time in current business and on long term contracts entered into when different price levels prevailed, is not such a difference as may justly be called a "discrimination" at all. Otherwise contracts for future delivery at fixed prices would be impossible or else a seller who had such contracts outstanding could not raise his price on new business at all—and could not lower it unless he gave similar reductions on all old contracts outstanding. It is not to be presumed that such a result was intended. No one can justly complain of "discrimination" if the same opportunity was open to him to enter into contracts for future delivery at the time such contracts were entered into by others.

The same reasoning would also justify the following common business practices, either under this particular exception or on the principle that properly considered, they are not discriminations "at all"—if they are open to all under the same circumstances:

1. Seasonal discounts—to move goods and promote operations during the dull season.
2. Differentials between "contract" and "spot" business.

If not justified under this exception, then they would clearly seem to be justified under the exception as to "methods of sale or delivery" previously referred to—though in that case the differentials would have to bear some relation to cost, which would be difficult if not impossible to compute.⁹

Possibly this exception might also justify a temporary discount to move a surplus stock of durable

9. Representative Utterback in explaining the bill was of the opinion that seasonal differentials could be justified as based upon differences in "methods of sale or delivery", saying (Cong. R. 9559):

"Or where one customer orders from hand to mouth during the rush of the season compelling the employment of more expensive overtime labor in order to fill his orders; while another orders far in advance, permitting the manufacturer to

goods, or to raise money to meet pressing financial obligations without any intention of lowering permanently the general market. It is doubtful, however, whether an overstock could be reduced by special deals—as distinguished from general, though temporary, changes in prices open to all.

(h) Meeting Competition

Section 2 of the Clayton Act originally provided that

"nothing herein contained shall prevent discrimination in price in the same or different communities made in good faith to meet competition."

It is obvious from the history of the present Act, both in the House and in the Senate, that, its sponsors, or some of them, particularly desired to omit that limitation. It was omitted from the Robinson Bill but reinserted by an amendment on the floor of the Senate. It was stricken out again in conference with the following explanation in the Conference Report

"This language is found in existing law, and in the opinion of the conferees is one of the obstacles to the enforcement of the present Clayton Act."

There was great opposition, however, to omitting the provision entirely. It was obvious that such an omission would work great hardship. It would completely disrupt the methods of manufacturing and distribution on which the industry of the country had been built up and would probably make the Act unconstitutional.

For example, it might have destroyed the business of manufacturers doing business on a national scale by preventing them from meeting the competition of manufacturers located near particular markets. On the other hand, small buyers might have found it impossible to get any of the business of a volume buyer because they could not give straight discounts to meet the quantity discounts of a large manufacturer.

Accordingly, the conferees did what they seem to have thought a very ingenious thing. They introduced into the Act in subsection (b) the following language¹⁰ which they claimed to be not a rule of substantive law but a mere rule as to the admissibility of evidence, namely:

"Nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

On its face this would seem to make the meeting of competition a complete defense, but Mr. Utterback, the Chairman of the House Conferees, explained that they, at least, did not intend it to be so, saying (Cong. R. 9560):

"It is to be noted, however, that this *does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence.* This provision is entirely procedural. It does not determine substantive rights, liabilities and duties. They are fixed in the other provisions of the bill.

use cheaper off season labor, with the elimination of overtime, or perhaps to buy his raw materials at cheaper off season prices. Such savings as between the two customers may likewise be expressed in price differentials."

Representative Utterback also thought contract and spot differentials justified, to the extent of differences in cost, by reason of difference in methods of sale and delivery (Cong. R. 9559). But to attempt to restrict spot differentials, in that way seems impractical.

10. This is applicable not only to subsection (a) but to any violation of Section 1.

It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, and whether the way in which the competition was met lies within the latitude allowed by those limitations.

"This procedural provision cannot be construed as a carte blanche exemption to violate the bill so long as a competitor can be shown to have violated it first, nor so long as that competition cannot be met without the use of oppressive discriminations in violation of the obvious intent of the bill.

"To illustrate: The House committee hearings showed a discrimination of 15 cents a box granted by Colgate-Palmolive-Peet Co. on sales of soap to the A. & P. chain. Upon a complaint and hearing before the Federal Trade Commission, this proviso would permit the Colgate Co. to show in rebuttal evidence, if such were the fact, an equally low price made by a local soap manufacturer in Des Moines, Iowa, to A. & P.'s retail outlets in that city; but this would not exonerate it from a discrimination granted to A. & P. everywhere, if otherwise in violation of the bill.

"But the committee hearings show a similar discount of 15 cents a case granted by Proctor & Gamble to the same chain. If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination, then it would nullify the act entirely at the very inception of its enforcement; for in nearly every case mass buyers receive similar discriminations from competing sellers of the same product. *One violation of law cannot be permitted to justify another.* As in any case of self-defense, while the attack against which the defense is claimed may be shown in evidence, its competency as a bar depends also upon whether it was a legal or illegal attack. A discrimination in violation of this bill is in practical effect a commercial bribe to lure the business of the favored customer away from the competitor, and if one bribe were permitted to justify another, the bill would be futile to achieve its plainly intended purposes."

If, as this explanation says, the proviso does not determine substantive rights but merely creates a rule of evidence, it is difficult to see elsewhere in the law where any substantive right to meet competition is expressly granted.

Moreover, if meeting competition is not a complete defense, then no practicable rule whatever is laid down to guide the seller in determining when it does constitute a justification. It may be said, as Mr. Utterback suggests, that he can only meet competition when the price that he is meeting is non-discriminatory and lawful. But no seller, in the heat of competition, can possibly determine that. He is faced with the necessity either of meeting competition or losing his business, and if he meets competition he must guess at his peril, with the burden of proof against him, whether the Trade Commission or a court or jury would hold him justified in doing so.

It does not seem to be probable that the courts will accept this impracticable rule and hold that a competitor may meet a lower price charged by another competitor only if that lower price is non-discriminatory and lawful—and that he must judge at his peril whether it is lawful or not within the meaning of this Act.

It seems more probable that in order to avoid the question of unconstitutionality, the courts will not take the same view as the Committee, and will construe the Act to mean that the meeting of competition is an absolute defense.

In at least two cases State statutes prohibiting discrimination have been held unconstitutional by the Supreme Court because they did not give the right to meet competition. *Fairmont Creamery Co. v. Minne-*

sota, 274 U. S. 1 (1927); *Williams v. Standard Oil Co.*, 278 U. S. 235 (1929).

In those cases it is true the meeting of competition was not admissible as a defense at all, whereas here it may be so, theoretically at least. But unless the defense is a complete bar it is no defense at all. The seller cannot be expected to act at his peril under a mere "rule of evidence" which sets up no standards by which he may determine when or whether the meeting of competition will be a defense—and compels him to act with the presumption established by the law against him.

Furthermore, under the language of Section 1(b) it is arguable that even this partial defense may be applicable only in hearings in "complaints" before the Federal Trade Commission—and not in private injunction suits or triple damage suits in the courts or in civil or criminal actions brought by the Department of Justice. Such a construction—again—would make the Law unconstitutional under the Fairmont Creamery Case cited above. It is to be hoped that it will not be so narrowly construed but that the courts will hold that even if the first clause of Section 1(b) applies only to commission proceedings, the second clause is of general application.

It should be noted also that Section 1(b) allows the meeting of competition "to meet an *equally low* price of a competitor." Apparently the seller to be protected by it must refrain from doing more than merely offering exactly the same price. That may be important as transferring price initiative to the local seller.

Where bids are called for, this may, under some circumstances, make it impossible for some sellers to do anything but bid the same price as the seller who has the price initiative.

It may also be important as making it necessary, for the protection of the seller, to know just what his competitors' prices are. Thus the law may greatly increase the importance of price filing with associations, for the protection of all concerned.

3. Brokerage Commissions, Advertising Allowances, Etc.

In addition to the broad and general prohibition against price discrimination, Section 1 also contains specific prohibitions directed against certain types of discrimination which the sponsors of the Act particularly desired to destroy. These specific practices are:

(a) *Fake brokerage commissions (or allowances or discounts in lieu thereof) paid*

"either to the other party to such transaction or to an agent, representative, or other intermediary therein, where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such competition is so granted or paid."

Such commissions are prohibited by Subsection (c)

"except for services rendered in connection with the sale or purchases."

It is uncertain what this exception means. It is quite clear that the sponsors of the Act had no idea that a buyer or his agent could render any services to the seller in connection with a sale to himself.

The evil aimed at was the use of such commissions as a cover for secret rebates. Whether it goes further and prevents the payment of discounts to cooperatives—such as cooperative associations of retailers—is not entirely clear. Apparently it was not intended to do

so—in the case of cooperative associations of *producers or consumers* at least. The statement of the House Managers with respect to the Conference Committee report says that Section 4 of the Act was intended to safeguard their rights. But the same statement points out that the words “or a cooperative *wholesale* association from returning to its constituent *retail* members” were stricken out of Section 4 in conference.

(b) Allowances for Services or Facilities

Allowances for services or facilities furnished by the buyers “in connection with the processing, handling, sale or offering for sale”—of goods made or sold by such buyer are prohibited by subsection (d)

“unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.”

This prohibition was aimed particularly at advertising allowances. It seems probable, however, that it would also prohibit payments to the buyer for storing or warehousing, the goods even before they have become the property of the buyer if they are ultimately to be resold by him.

(c) Discrimination as to Services or Facilities Furnished to the Buyer

Such discriminations in favor of purchasers of goods bought for resale are prohibited by subsection (e), when such services or facilities are

“connected with the processing, handling, sale or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.”

It is impossible to determine how the words “proportionally equal terms” can be complied with. What is the standard of comparison? For example, is it the relative amount of goods purchased by the two buyers, and if so, purchases on what terms and over how long a period? Or is it the value of the advertising or other service received by the seller? The value of a joint advertisement in a large metropolitan paper is very different from the value of similar advertising by another customer in a country newspaper. A small window display on an important street corner may be much more valuable than a larger display in a less desirable location. Warehousing may be indispensable in some locations and useless in others.

It should be noted in passing that whereas subsection (d) requires the allowances to be available to all *competing* customers, subsection (e) requires the services or facilities to be accorded to *all* customers whether competing or not.

4. Effect on Existing Contracts

The Act makes no provision expressly exempting contracts existing prior to its passage of a nature which would have been prohibited by the Act if entered into today. Apparently its sponsors so intended¹¹ though there is no express provision striking them down and laws have sometimes been construed

as not retroactive where property rights would be affected thereby.¹²

5. Liability of Buyers for Violations

Section 1(f) makes it unlawful for anyone who is “engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.”

Section 3 makes it criminal “to be a party to or assist in, any transaction of sale, or contract to sell which discriminates to his knowledge”

Thus the buyer, as well as the seller, may be subject to criminal penalties, triple damage suits, injunctions and Trade Commission proceedings for violation of the law.

This is intended to make it easier for the seller to obey the Act by diminishing the importunities of the buyer for special favors.

6. Interstate Commerce

Subsection (a) of Section 1—unlike previous anti-trust laws—applies to a discrimination between competitors where one sale is interstate and the other intrastate in character. This is a new conception of the anti-trust laws, and is based upon the theory of the *Shreveport* case, 234 U. S. 342, where it was held illegal for intra-state railroad rates to discriminate against interstate rates. Furthermore, Subsection (a) does not apply to export trade.

The Act is not consistent as to this jurisdictional point, however.

Subsections (c) and (d) of Section 1 relate only to sales in interstate and foreign commerce without reference to intrastate commerce—and do apply to export sales.

Subsection (e) of Section 1 apparently has no territorial limitations. In terms it would apply even to purely intra-state commerce—which it could not constitutionally do.

Section 3 relates to sales by persons “engaged in commerce, in the course of such commerce”—the word “commerce” was undoubtedly used under the impression that the definition of that word in the Clayton Act would apply. That definition would cover both interstate and foreign commerce and include export sales, but would exclude intrastate commerce. Section 3 is not part of the Clayton Act, however, and it may be that the word “commerce” as used in Section 3 will be construed as meaning *any* commerce—including intrastate commerce.

II.

SECTION 3

By reason of the foregoing exceptions and limitations Section 1 of the Act—though troublesome enough—seems to me capable of a reasonable con-

11. The following colloquy on this point occurred between Senator Van Nuys reporting for the Conference Committee, and Senator Vandenburg (Cong. R. 10017):

“Mr. Vandenburg: Is there any period of grace permitted for existing contracts which would fall under the proposed inhibitions but which would necessarily have to be completed?”

“Mr. Van Nuys: I think not.

“Mr. Vandenburg: There is no period of grace?”

“Mr. Van Nuys: There is no period of grace.”

12. The cases holding existing contracts invalid after the passage of the law forbidding railroad rebates are perhaps distinguishable. See *Louisville & Nashville Railroad Co. v. Motley*, 219 U. S. 467; *New York City R.R. Co. v. U. S.*, 212 U. S. 500. But see also *Motion Picture Patents Co. v. Universal Film Co.*, 235 Fed. 398, aff’d 243 U. S. 502; *Elliott Machine Co. v. Center*, 227 Fed. 126, holding that Section 3 of the Clayton Act invalidates continuing contracts made before passage of the Act, and *U. S. v. Southern Pacific Co.*, 259 U. S. 214, holding that combinations effected prior to the Sherman Act were illegal after its passage.

struction which would not too seriously disrupt the ordinary methods of doing business hitherto prevailing.

The really dangerous provision of the Act, if literally construed, is Section 3.

It is possible to consider Section 3 as merely a rough way of adding criminal penalties to the civil remedies of Section 1.

It is also possible to construe the Robinson-Patman Bill as containing a very clever joker—designed

First, to prohibit discrimination generally in Section 1, and to include in that section alone the exceptions and limitations necessary to satisfy the more conservative members of Congress; and

Second, to defeat those limitations altogether by re-enacting substantially all the provisions of Section 1 with no exceptions or limitations whatsoever—and in addition to impose criminal penalties upon their violation.

I hope that Section 3 will not be given that construction. If it is, I believe that it will be held unconstitutional.

But first let us see what Section 3 prohibits.

Section 3 contains three clauses which make three things unlawful. They are:

1. To be a party to, or assist in, any transaction of sale or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity.
2. To sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor.
3. To sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

1. Discrimination under Section 3

The first of these clauses is the most dangerous. It prohibits discrimination in the most sweeping terms. None of the exceptions and safeguards contained in Section 1 are expressly made applicable to Section 3 except discounts based on grade, quality or quantity, and if literally construed, every other discount or price variation between competitors of any nature whatsoever would be prohibited regardless of either its purpose or effect.

If the first clause of Section 3 were so interpreted, it would turn every private industry into a public utility—obligated like other public utilities to offer the same price to every customer.

This probably cannot constitutionally be done in the case of private industries generally¹³ where no emergency or other special circumstances exist, such as existed in the rent case, *Block v. Hirsch*, 256 U. S. 135 (1921), the milk case, *Nebbia v. New York*, 291 U. S. 502 (1934) or (so at least some of the Justices

thought) in the Guffey Act case, *Carter v. Carter Coal Co.*, 56 S. Ct. 855 (1936).

Moreover, unless the word "discrimination" were given the liberal interpretation which we have referred to elsewhere, it would disrupt the whole existing system of production and distribution.

It would prevent the delivery of goods on long term contracts at prices either above or below those prevailing at the time of delivery. It would prevent the use of seasonal discounts. It would prevent the giving of lower prices even where necessary to meet competition. It might even forbid the giving of functional discounts to wholesalers and retailers and thus prevent the use of historic channels of marketing which are of great utility and have never given rise to any tendency to monopoly or to other public injury.

A statute having such devastating consequences would constitute an unreasonable interference with freedom of contract, a confiscation of private property and a violation of the due process clause of the Constitution.

And, finally, such an interpretation would compel an even greater degree of price uniformity than that which was so strongly criticised by opponents of the NRA.

In order to avoid these consequences it seems probable that the word "discriminate" as used in the first clause of Section 3 will be held to mean not mere difference in price—but a difference where there is a duty to treat all parties alike—under similar circumstances and conditions.

In other words, the courts might read into the first clause of Section 3 a "rule of reason" and hold that it prohibits only "unreasonable" discriminations—i. e., discriminations between competitors under similar circumstances—without reasonable justification or excuse. This is substantially what the Supreme Court—interpreting the Sherman Act—did to the phrase "every combination . . . in restraint of trade."

In this manner the court might hold that discrimination in Section 3 means substantially the same thing that is prohibited in Section 1, with which it is in pari materia.

It would be strange indeed if Section 3—the criminal section—should be held to be so much more drastic than Section 1—and that it should make acts criminal which are not even subject to civil remedies under Section 1 or elsewhere.

2. Local Price Cutting under Section 3

The second clause of Section 3 merely prohibits local price cutting which was prohibited by the Clayton Act prior to the present law. It creates no new or special difficulty.

3. Selling at Unreasonably Low Prices

The third clause, however, introduces a novel and exceedingly dangerous prohibition against selling at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

(a) What Are Unreasonably Low Prices?

There is no standard whatever for determining what are unreasonably low prices. Does it mean below a reasonable profit? If so, what profit is reasonable?

Does it mean substantially below the existing market if the requisite intent exists?

Does it mean below cost to the seller; or below the cost to the injured competitor; or below a "reason-

(Continued on page 649)

13. *Wolf Packing Co. v. Court of Industrial Relations*, 262 U. S. 522; *Tyson & Brother v. Banton*, 273 U. S. 418; *Ribnik v. McBride*, 277 U. S. 350; *Williams v. Standard Oil Co.*, 278 U. S. 235; *New State Ice Co. v. Liebmann*, 285 U. S. 262.

THE CONSTITUTION OF THE UNITED STATES

The Processes of Government Are Not Static, and Our System Would Not Have Achieved Its Success Without an Interpretation of the Organic Law Which Treated Its Grants and Limitations as Indicating the Course of Government Rather Than the Boundaries of Its Powers—The Great Problem of National Competency to Correct Certain Economic and Social Evils, Which Many Believe the States Cannot Handle Effectively, Confronts This Generation—Disagreements as to Constitutional Interpretation Inevitable, etc.*

By HON. STANLEY REED
Solicitor General of the United States

HISTORY teaches us that the processes of Government are not static. A system of government is created, develops, changes, expands, contracts, is adjusted and readjusted, not because of some philosophical concept of the function of society or the rights of man but to meet the varying needs of the nation. Law and order must be preserved. The right to life, liberty and the pursuit of happiness is never questioned. The privilege of acquiring, holding and transmitting property is recognized as something inseparable from our conception of the inalienable rights of man. After government has become fixed in its forms, changes are difficult. Life proceeds upon the assumption that the existing status will continue into the indefinite future. Forms persist long after their usefulness has ended. The Founding Fathers would doubtless be as surprised to find the provisions for Presidential electors practically futile, as we would be to learn an elector had betrayed the ticket upon which he had been chosen.

This generation does not even need to look through the pages of history to recognize the truism that governments are adapted to the needs of the governed. We do not need to recall feudalism, absolutism or the limitation of monarchies. Sultans, emperors and czars have disappeared before our astonished gaze. Parliaments have been replaced by cooperatives. Novel systems of government whose operations are but vaguely apprehended have succeeded to those long accepted as consonant to the historical development of nations. Peoples persist. Their political organizations vary.

Our Constitution was devised to meet the requirements of this new nation. It was not the work of theorists but of practical and experienced statesmen. After the adoption of the Articles of Confederation in 1778, the inhabitants of the several states had watched the efforts of a powerless Congress of the Confederacy, under an impotent executive, to weld the former colonies into a nation. Its authority flouted, at home and abroad, it became quickly apparent that unless the new Government was reorganized with sufficient authority to enable it to function in matters concerning which the separate states were incompetent, there would be complete disintegration. The idealism of the French political philosophers was then in the ascendancy in Europe. Our leaders had been in the closest

touch with this movement. Appreciating the necessity of altering the Articles to meet the needs of the new nation and desirous at the same time of protecting the rights of the individual, the members of the Constitutional Convention gathered to write our Constitution.

Within its pages, there are specifications as detailed as the age of officers or the number of members of each House necessary for a quorum, or the machinery of the veto. These, however, are administrative matters. The clauses as to the delegation of powers are couched in the broad language of statesmanship—To declare War—To raise and support Armies—To lay and collect Taxes—To borrow Money—To regulate Commerce among the several states. Its authors intended it as a statement of principles upon which the Government should operate into the indefinite future, not a code of laws written to meet the needs of an existing and well understood condition. "A Constitution," said Mr. Justice Holmes, "is not intended to embody a particular economic theory, whether of paternalism, or the organic relationship of the citizen to the State, or of laissez faire." Its purpose was stated in the preamble, and while of course that preamble is not a grant of power, it is a Declaration of Purpose, a touchstone by which the actual grants may be tested.

"We The People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessing of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

When we stop a moment to reflect how a system of government, designed for a fringe of farmers, merchants and seamen, along the Atlantic seaboard has been adapted, with only minor amendments, to the needs of a great nation, we realize that such success would not have been achieved without an interpretation of our organic law which treated its grants and limitations, as indicating the course of government, rather than the boundaries of its powers.

It is a far cry from the America of Washington's Administration to the America of today. Even then, however, men of vision, at home and abroad, realized that the United States was to play no minor part in the drama of civilization. In the halls of the convention and in the Councils of Europe its opportunities for growth and expansion in population, power and wealth were appraised in terms which presaged its present

*Address delivered before the Institute of Public Affairs of the University of Virginia, at Charlottesville, Va., on Monday, July 13, 1936.

commanding position. Though its people were busily engaged in clearing forests, subduing lands, beating off savage forays, carrying on petty commerce and localized manufacture upon a small scale, their ambitions looked forward to the future, when the impediments of that day had been overcome and our country took its place as an equal among the nations of the world. The natural wealth of the continent was already understood. The tide of immigration had set towards our shores. Cities were growing. Population was increasing. The thrust Westward had begun. The Northwest Territorial Government had already been established. We sought an outlet down the Mississippi. We were just beginning to sense the changes that were to come in industry, commerce and society.

The concept of individualism had taken firm root in America. It was then and has been ever since a fundamental tenet of Americanism. The initiative which inspired our forefathers to carve a home for themselves in the wilderness; to come across the seas to secure civil and religious liberty and economic opportunities for themselves and their posterity has been the unseen power which animated their efforts to develop this broad land. Scattered along the coast and through the forests, living in states with diverse interests and without close communication, wary of direction from those unfamiliar with their problems, it was only natural that the individualism of our early period should have taken the form of opposition to governmental restraint or direction of any kind. In those days, the effect of one man's action on another's rights was relatively unimportant. We do not waver in our adherence to this individualism.

But the experience of the last half-century has driven us to the realization that, after all, we live in a factual world where organized groups, whether for production, commerce or propaganda, are too powerful to permit the feeble force of the individual to survive. The blacksmith has given way to the Steel Corporation, the Pony Express to giant railroad systems, fire-side products to the textile mill, and the carriage maker to General Motors. In our society, the voice of a single man, whatever its strength, is drowned in the volume from groups, sections and unified interests. Even with a matter so personal as charity, the individual contribution has proved ineffective to meet the mass needs of millions, suffering the penalties of a general economic dislocation. Regretfully but inevitably we must adjust our lives and our government to modern needs and find, in a Constitution written for a simpler era, guidance for the problems of our present age.

It is trite to say we live in a period of complex social and economic problems. No one doubts that the development of widespread industries employing thousands of men or the concentration of typical industries in limited geographical sections have produced conditions calling for regulation of labor relations.

By 1930 about 40 per cent of the business wealth (other than banking) of the country was represented by the balance sheets of the 200 largest corporations, and they were growing at a rate two and a half times as great as that of other corporations.¹ The growth of these great concerns, as well as that of the smaller organizations, has been marked in some cases by a nation-wide distribution of the activities of a single firm, and in others by a sectional concentration of an entire industry. Each development raises problems of great complexity for a federated government. There were

in 1929, 26,286 central office combinations, i.e. firms with two or more establishments. Establishments include manufacturing operations or those which produce fuel or raw materials for the industry; 314 of these operated 10 or more establishments in 1919; 44 were within single States; 30 within two States; 115 in a group of States, while 125 were so scattered as to be national. Ten of the largest show this distribution:

Company	Number employed in 1929	Number of States in which establishments are operated
General Motors	233,286	14
United States Steel.....	224,980	12
Ford	100,000 ¹	8
General Electric	87,933	10
Bethlehem Steel	64,316	9
Armour	60,000	24
Swift	58,000	16
Standard Oil Co. of New Jersey..	44,700	14
International Harvester	40,000	8
Goodyear	39,735	6

Total 952,950²

¹Exact figure confidential.

²Over.

Sources: *Employment*: For General Motors, U. S. Steel, General Electric, and Bethlehem Steel: *Standard Corporation Records*, published by the Standard Statistics Co. For Standard Oil of New Jersey and Goodyear: *Moody's Manual of Industries*.

Number of States: Compiled from *Standard Corporation Records*, published by the Standard Statistics Company.

LOCAL CONCENTRATION IN INDUSTRIES, 1929

Industry	Value of product (thousands)	States in which concentrated	Percent of value produced in States of concentration
Motor Vehicles.....	\$3,722,793	Michigan and Ohio...	52
Steel Works and Rolling Mills	3,365,789	Penn., Ohio, Ind. & Ill.	78
Women's Clothing.....	1,709,581	New York	76
Cotton Goods	1,524,177	N. C., S. C., Mass. & Ga.	66
Rubber Tires & Tubes	770,177	Ohio	65
Fur Goods	277,593	New York	82
Millinery	195,693	New York	64
Motion Pictures ¹	184,102	California and N. Y..	94
Corn Products	165,984	Illinois	58
Cheese	110,645	Wisconsin	59

¹Cost of production.

Source: Bureau of the Census, *Manufacturers, 1929*, Vol. II.

What striking changes from 1811, when the largest wool factory employed 150 people or even 1860 when Brady's Bend Iron Company was the behemoth industrial enterprise with 538 laboring families. (Clark, Victor S., *History of Manufactures in the United States*, Vol. I, page 438 ff.) Because of this changed society, we have problems of government, such as finance, immigration, social and labor relations.

In addition to the problems raised by the concentration of industry and labor, there are the greatest social problems of this period, represented by relief, unemployment, old age, retirement of railroad employees, loans to states and municipalities for public works, housing resettlement and soil conservation each of which must run the gauntlet of constitutional test.

This generation is called upon to grapple with and settle the question of whether under our Constitution, the National Government is competent to legislate for the correction of certain economic and social

1. Berle and Means, *Modern Corporation and Private Property*, pp. 32, 35.

conditions which many believe cannot be effectively handled by State action.

In my consideration of these questions, I am not discussing the desirability of constitutional amendments. As citizens, our views may differ. As lawyers, our views should not be colored by influences other than those which appeal to our judgment upon constitutional interpretation.

We are one in believing that even though the Federal government may be empowered to treat, in one manner or another, with certain recognized evils, it is unwise to apply remedies on a nation-wide scale, when adequate redress of substantially equal effectiveness may be secured through State legislation. We differ only in our determination of the line that separates the necessity of national action from the desirability of state action. It is hard to determine, for instance, when relief of destitution has passed beyond the ability of the State to handle into the realm which requires Federal interposition. Everyone believes that only those powers, in addition to historically conceded governmental functions, essential to remedy abuses beyond the powers of the separate States to redress, should be exercised by the Federal Government.

The basic charter of our liberties is under minute examination to determine whether certain currents of legislation, believed by many to be essential to the continuity of our processes of Government, are within constitutional channels. That determination while influenced by public opinion will be made by the judiciary and the advocates. The conclusion must be reached by processes of reasoning, not of prejudice. We must divorce ourselves from preconceived economic and social convictions, and examine proposals for the amelioration of injustices in the light of the history of our country and the precedents of our courts.

The problems of constitutional interpretation which by reason of their very nature lend themselves to the calm reflection of the study have suddenly become a matter for heated argument in the forum. Fiery polemics are issued by opposing groups. Actions of Congress in passing legislation, believed by its opponents to transcend Federal powers, are denounced as subversive of our principles of constitutional government. Organizations have even been formed, and curiously enough have succeeded in attracting subscriptions and members, whose sole declared purpose is "to defend and uphold the Constitution of the United States" and disseminate information for that purpose. By an intemperance of thought and word, rarely equaled, these self-appointed guardians of the Constitution have attempted to arrogate to themselves a position as interpreters for the American people of the authority conferred by that document. Such conclusions are beyond the competence of others than the judiciary. To the courts of the land, there has been entrusted the high and delicate duty of harmonizing conflicting views and of clearing away misconceptions as to the extent or limitation of State or Federal powers. Surely there is nothing in our recent history that would indicate the Government does not frankly and fully acknowledge this power. It is true legislation has been before the Supreme Court, which embodied conceptions of federal power which the High Court has held did not accord with its interpretation of the Constitution. *N.R.A.*, The *Schechter* decision, *AAA*, the *Hoosac Mills* decision and the *Guffey Coal Bill*, *Carter v. Carter Coal Co.*, are the most striking examples. In each instance, the Government accepted

the ruling, discontinued efforts at enforcement and is attempting, in good faith, to clear away the complications remaining from the invalidated legislation. It has even gone farther and, through recommendation of the President and by action of Congress, has repealed such acts as the Bankhead Cotton Act, the Smith-Kerr Tobacco Act and the Potato Control Act which apparently were invalidated by the reasoning of the *A.A.A.* opinion. Such an attitude should convince every citizen that the Constitution, as interpreted by the Supreme Court, is preserved, protected and defended by every official and agency of the Government. Surely the opponents of change are not so certain of the correctness of their position as to deny the propriety of passing legislation, designed to remedy abuses or to further social justice, even though the powers upon which such acts are based have not heretofore been exercised by Congress, in such a manner.

Notwithstanding changed conditions, new situations, new ideals and aspirations, I find within the present language of the Constitution clear evidence of the intention of its framers and the ratifying states, that adequate powers to deal with modern problems were intended to be and are delegated to the federal government. Of course, it is true that the specific situations were not foreseen, but the Supreme Court has definitely declared that this could not limit the powers actually delegated. There are two statements as to the bases of constitutional interpretation I would like you to consider.

"The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. . . .

"It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation."

That statement is not one of my formulation, but is a quotation from the language of Chief Justice Charles Evans Hughes, speaking for the Court in *Home Building & Loan Association v. Blaisdell*. It represents a conception of constitutional interpretation which I believe to be fundamental to any consideration of the character of constitutional government.

Another is from Justice Sutherland, in *Euclid v. Ambler Co.*, 272 U. S. 387:

Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity

is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances, which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall."

Disagreements as to the interpretation of the Constitution are inevitable. They have existed since the foundation of the Government and will continue to its end. They arise because of the language of the clauses containing the great grants of power. Quite properly they were not made specific. It may be said of them, as Justice Holmes said of the due process clause, that it was a protection of "hazy outlines".

In any consideration of the Government's attitude towards constitutional interpretation, the way will be cleared by a clear understanding of certain theories of constitutional interpretation which the Government has not advanced. I speak of them because certain antagonists have indicated a misapprehension of the Government's position.

The Government does not believe that emergencies create powers. It is true that emergencies may justify a greater extension of the exercise of a power than has been heretofore employed. This was made abundantly clear in the first of the decisions upon emergency measures. *Home Building & Loan Assn. v. Blaisdell*, 290 U. S. 398, 425-6:

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

"While emergency does not create power, emergency may furnish the occasion for the exercise of power. 'Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.' *Wilson v. New*, 243 U. S. 332, 348. . . ."

The Government has never contended that a sovereign power, over and above the granted powers, existed by reason of the creation of the Nation. This theory was denied by the Supreme Court in *Kansas v. Colorado*, 206 U. S. 46, many years ago.

The Government has never contended that the general welfare clause is a grant of plenary power. It has not assumed that the phrase "to pay the debts and provide for the common defense and general welfare of the United States" meant anything further than the right to lay and collect taxes, duties, imposts and excises and to appropriate the resulting funds for those purposes. By rejecting these aids to an ultra-liberal interpretation of the Constitution, the Government has limited its contentions to what has seemed to it a sound view of the meaning of the Constitution. Some may disagree as to whether the meaning attributed to the clauses by the Government is correct, but none can properly say that the meaning is obviously contrary to a proper interpretation of the Constitution. The final determination must be left as it always has been—to the judgment of our highest court.

From the earliest days of the Republic, disagreement as to proper constitutional interpretation has been frequent. May I quote in part a letter from a President of the United States:

"The constitutionality of it is objected to. It there-

fore becomes more particularly my duty to examine the ground on which the objection is built. As a means of investigation, I have called upon the Attorney General of the United States, in whose line it seems more particularly to be, for his official examination and opinion. His report, is, that the Constitution does not warrant the Act. I then applied to the Secretary of State for his sentiments on this subject. These coincide with the Attorney General's, and the reasons for their opinions having been submitted in writing, I now require, in like manner, yours on the validity and propriety of the above-recited Act; and, that you may know the points on which the Secretary of State and the Attorney-General dispute the constitutionality of the Act, and that I may be fully possessed of the arguments for and against the measure, before I express any opinion of my own, I give you an opportunity of examining and answering the objections contained in the inclosed papers. I require the return of them when your own sentiments are handed to me (which I wish may be as soon as is convenient); and further, that no copies of them be taken, as it is for my own satisfaction they have been called for."

The date-line of that letter reads "Philadelphia, Feb. 16, 1791." It was penned by George Washington and addressed to Alexander Hamilton. It concerned an Act authorizing the Charter of the First Bank of the United States. The Attorney General to whom he refers was Edmund Randolph; the Secretary of State was Thomas Jefferson. Hamilton wrote an opinion which demolished the arguments of Randolph and Jefferson, convinced the President, and resulted in the approval of the Bill. Hamilton's views were sustained by the Supreme Court when it passed upon a later Act involving the same subject in the famous case of *McCulloch v. Maryland*, 4 Wheat. 316.

From that day to this, there has raged the battle of the proper construction of the Constitution. The ink seems barely to have dried upon the ratifications of the Constitution before the Congress, with a membership which included many leading members of the Federal Convention, witnessed bitter debate as to the constitutionality of pending legislation. Five Presidents, from Madison to Buchanan, vetoed as unconstitutional acts providing for public works, such as the improvement of rivers and the construction of a national highway. Some were passed over the veto of the President and some were defeated; but we have long since acceded to the view that the Government has a right to carry out a program of public works. When the Webb-Kenyon Act had been passed by Congress, President Taft supported by his then Attorney General, George W. Wickersham, vetoed the Bill as unconstitutional. It was passed over the veto by a large majority, and, as if definitely to show that even the greatest lawyers may be mistaken, the Supreme Court promptly upheld the Act as valid in the case of *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U. S. 311, referring, aliunde, to the adverse opinion of the Attorney General to the President. The constitutional controversy over the Legal Tender Acts of the sixties will never fade from the memory of American lawyers. These Acts were passed in a time of national crisis, brought on by the war between the States, and were based upon the power of Congress to coin money and fix its value. For the first time, Congress undertook to make paper money legal tender. In *Hepburn v. Griswold*, 8 Wall. 603, the Supreme Court declared these Acts unconstitutional, only to reconsider in *Knox v. Lee*, 12 Wall. 457, the *Legal Tender Cases*, 12 Wall. 457 and declare them constitutional. The constitutionality of the Interstate Com-

merce Act was forcefully attacked during the debates in Congress, as was the Child Labor legislation. One was held valid, the other invalid. Control of the grain exchanges was declared unconstitutional in *Hill v. Wallace*, 259 U. S. 44 and, after enactment upon a different theory, declared constitutional a few years later in *Board of Trade v. Olson*, 262 U. S. 1. This difference in view as to the constitutionality of legislation has, of course, continued to the present day. Moreover, the divergence of opinion as to constitutionality has not left untouched those who sit in high places. Five members of the Supreme Court upheld the constitutionality of the gold resolution as applied to private contracts; four thought it was unconstitutional. Six members of the Supreme Court held the Agricultural Adjustment Act unconstitutional; three declared that in their opinion it was constitutional. Eight members of the Supreme Court upheld the right of the Tennessee Valley Authority to sell its power, and one declared that such action violated the Constitution of the United States.

The world is enamored of formulae. Science has taught us the virtue of a workable certainty of prediction. In medicine, we seek specifics. We are impatient of the variableness of the pole star and prefer to navigate by radio beacons. Such certainty, however, is not for law, any more than for the other social sciences. Our answers must depend upon the clarity and uniformity of prior decisions, viewed from a perspective which may well be biased by personal or public desire. However unreliable our data, men must act, and act on the best obtainable information. Life must go forward. For this, the lamp of experience is still our best guide. This does not mean a fatalistic subordination to precedent. Along that path lies stagnation, a slavish adherence to the past. Sound progress follows the old courses, but extends to new fields and utilizes the known to project our advance through the unknown. Until we can hear the voice of final authority, we must reach conclusions upon constitutionality on which normal life must proceed. Society has functioned heretofore on this basis. Desirable as certainty undoubtedly is, it is impossible of attainment without a complete abandonment of every prospect for progressive legislation. This, of course, would be to purchase certainty at a cost beyond reason. Our legislation must keep pace with economic and social requirements.

I have spoken of several well-known controversies over the interpretation of clauses of the Constitution. There is one controversy that has raged with peculiar virulence from the earliest days of our nation. It is that which involves the interpretation of the general welfare clause, which provides "That Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and General Welfare of the United States." As you will recall, this was followed by various other clauses relating to the war, fiscal, postal and general powers of the Federal Government. The question arose early as to whether the power to levy taxes, to pay the debts and provide for the general welfare did or did not grant a substantive power to the Federal Government in addition to those that were directly enumerated thereafter. There were two main interpretations, each of which received the support of a distinguished group of statesmen and constitutional lawyers. One became known as the Hamiltonian theory, because it was first advanced by Alexander Hamilton in his famous Report on Manufactures.

Hamilton took the position that the grant of power to levy taxes and to provide for the general welfare carried with it the power to appropriate the Federal Funds raised by taxation to any purpose which Congress might determine as being for the general, as distinct from local, welfare. The opposing interpretation came to be known as the Madisonian interpretation, because of the ability and standing of James Madison, who was its most eminent exponent. Madison believed that the power granted to levy taxes and to provide for the general welfare was limited, in the exercise of the appropriating power, to the class of express powers otherwise granted in the Constitution, and that the Congress did not have the right to appropriate moneys for purposes beyond those express powers. The battle over these respective views raged from their first formulation until the recent decision in *United States v. Butler*. Each side could call from the rolls of the past eminent names to support their theory. The question was several times before the Supreme Court, but not until the A.A.A. case was the controversy finally set at rest. Justice Roberts, writing the opinion for a Court which was unanimous upon this phase of the case, said:

"We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."

Thus ended much the hardest fought and the most protracted controversy over the proper interpretation of a constitutional clause. Until its final resolution none could properly assert categorically that his view was correct while the opposition was wrong.

The difference in view is often spoken of as the difference between the strict and liberal constructionists. I prefer a slightly different terminology. It is a difference between political philosophies. One group holds to the view that only those powers are delegated which fall within the necessary interpretation of the grant, together with those deemed proper for their exercise. The other believes that the Constitution was intended as a guide to policies rather than a codification of a system of Government. One desires to retain in the States every power not definitely transferred to the Federal Government or prohibited to the States. The other does not limit the exercise of federal power to those historically employed, but is of the opinion that within broad delegated powers, new functions should be exercised by the Federal Government to meet new conditions. On account of the indefinite character of the great clauses of the Constitution, this difference of philosophy readily manifests itself in opinions as to constitutionality of legislation which is based upon these clauses.

This difference in philosophies is frequently bottomed upon social and economic predilections, which give weight to factual situations leading to the enactment of legislation. Frequently the determination as to the constitutionality of an act depends upon whether in the opinion of the judge the thing condemned or encouraged is effective to interfere with conditions, recognized by all as within the ambit of federal powers. May I illustrate by *Norman v. Baltimore and Ohio*, 294 U. S. 240 (the private obligation, gold-clause case). The so-called "Gold Clause Resolution" had

declared that every obligation calling for gold might be discharged upon payment in "any coin or currency". The power of Congress to declare what was legal tender had not been questioned since *Knox v. Lee*, 12 Wall. 457. Neither was there any doubt that private contracts which interfered with the exercise of this power were invalid. *L. & N. R. R. v. Mottley*, 219 U. S. 467; *P. B. & W. v. Schubert*, 224 U. S. 603. The controversy settled around the question of whether gold clauses interfered with the use of the money clause of the Constitution. Mr. Justice McReynolds clearly recognized this situation when in his dissenting opinion he said:

"This Resolution was not appropriate for carrying into effect any power entrusted to Congress. The gold clauses in no substantial way interfered with the power of coining money or regulating its value or providing an uniform currency. Their existence, as with many other circumstances, might have circumscribed the effect of the intended depreciation and disclosed the unwisdom of it. But they did not prevent the exercise of any granted power. They were not inconsistent with any policy theretofore declared."

The majority of the Court concluded that private gold clauses did directly interfere with the Congressional power to coin money and regulate the value thereof, since it would be practically impossible to have two currencies, one for the payment of debts, another for the operations of business.

In the *Railroad Retirement*, 295 U. S. 330, *United States v. Schechter*, 295 U. S. 495 and *Carter v. Carter Coal Company* cases decided May 18, 1936, the conclusion that the authorized or interdicted transactions did not directly affect situations within the power of Congress, furnished the basis for the invalidation of the acts. In the A.A.A. case the determination turned upon whether or not the benefit contracts coerced the farmer into acceptance of the plan. Had a majority of the Court determined the factual situation differently, a favorable decision upon constitutionality would have resulted.

Another important reason for differences as to the constitutionality of legislation has existed in America from the earliest days. When there arose a demand for the creation of Government fiscal corporations; for the levy of an income tax; for the issuance of paper money; for the regulation of transportation; for the control of interstate-commerce; for the regulation of labor directly affecting commerce between the States; for the spending of money for the general welfare, certain groups took a position antagonistic to the power of the Federal Government to provide for these requirements. Each involved an extension of the power of the Federal Government to fields which it had not theretofore occupied. In favor of such wider use of Federal power were the groups that were convinced that no longer were the States in a position effectually to restrain encroachments upon the liberty of the individual. The most numerous and effective of the opponents were those who believed in the theory of political philosophy, which taught that such exercise of power was inadvisable and had not been granted to the Federal Government by the Constitution. The cleavage between the opposing camps was not new, perhaps it has widened. As a matter of fact, the controversy was well-advanced at the time the Constitution was adopted. Some espoused the theory that the Federal Government should have only those powers absolutely necessary to maintain the Nation. Others contended that the Constitution should and did author-

ize, within its delegated powers, social and economic legislation which required national rather than state action. Their differences are fundamental and date from the days of the Confederation. The difference was well-defined at the time of the ratification of the Constitution.

Humphrey Marshall correctly summed up the situation when he said:

"The most common and ostensible objection," said he, "was that it (the Constitution) would endanger state rights and personal liberty—that it was too strong."

The opposition was particularly strong in Massachusetts, Virginia and New York. Governor Clinton, who had ruled the Empire State for more than a decade, was definitely opposed to ratification. Patrick Henry raised his powerful voice in opposition in Virginia. Richard Henry Lee, a signer of the Declaration of Independence, a President of the Continental Congress, and one of the first senators from Virginia was bitterly opposed. George Mason said in the Virginia Debates:

"My principal objection is, that the Confederation is converted to one general consolidated government, which is one of the worst curses that can possibly befall a nation."

"This government," cried Patrick Henry, "Is not a Virginian, but an American government." "I most sacredly believe," reported Luther Martin to the Maryland legislature, "their object is the total abolition of all state governments and the erection on their ruins of one great and extreme empire."

The taxing power, in particular, was opposed. In Massachusetts it was said:

"No more power could be given to a despot than to give up the purse-strings of the people."

"A standing army," exclaimed Nason in the Massachusetts Convention, "was it not with this that Caesar passed the Rubicon, and laid prostrate the liberties of his country? By this have seven-eighths of the once free nations of the globe been brought to bondage! . . ."

One of the more lurid fears of the day arose from what now seems the innocuous District of Columbia clause. It was to be the armed and fortified fortress of despotism. "This, my friends," said one of the candidates for the Convention in North Carolina, in language not wholly unlike the more extravagant alarms sounded in our time, "will be walled in or fortified. Here an army of 50,000 or perhaps 100,000 men, will be finally embodied and will sally forth, and enslave the people who will be gradually disarmed."

This conviction of the anti-Federalists of pre-constitutional days, as to the danger inherent in a strong and vigorous national government, has descended through the years to the heirs of their political philosophy. The danger of a strong Federal government, embracing a hateful bureaucracy, is a spectre whose dreadfulness does not diminish as it recurs and as it is found, ordinarily, to be no more substantial than the mists which dissolve at daybreak. Today we find the same antipathy to a virile and active Federal government, capable of meeting the exigencies of modern life, when we discuss or enact social welfare legislation, regulation of securities and exchanges, labor relations in interstate matters, effective control of banking practices, or expenditures for the relief of unemployment.

Those who today oppose extension of the Federal power possess no abler advocate than the Honorable John W. Davis of New York. In the annual address

before the New York State Bar Association, on January 24th of this year, he chose as his topic the "Redistribution of Power" and contended in eloquent phrases that power was needlessly being taken from the States and transferred to the Federal government. I quote from his address:

"With every eye turned toward Washington and every hand outstretched for what Washington has to give, our federal system will soon lose all vigor. When that time comes, there must eventuate a union torn apart by the clash of group and sectional interests, or a despotism—under what name it matter not—strong enough to maintain our continental unity by force; and not by force only, but by that suppression of freedom of opinion, of speech, and of action to which every dictatorship instinctively resorts."

These men, like the Clintons, the Henrys, the Lees and the Adamsons of an earlier day, are sincere in their opposition to any interpretation of the Constitution that permits the Federal government to exercise appreciably wider or different powers from those that it has heretofore employed.

The thought was amplified in briefs filed by able counsel as friends of the court in *United States v. Butler*, where a similar position was taken in regard to the general welfare clause. The language follows:

"The power to tax implies the power to appropriate, and that is implicit in the limiting phrase, but if the power to appropriate carries with it the power of application and execution the latter power must be limited to the enumerated powers and those to be implied therefrom or it is destructive of the limitations imposed by them and they become utterly meaningless. If the power of appropriation does not carry with it the power of application and execution it is utterly meaningless, except as it might be made use of, as is now being done, to usurp that power by indirection. . . .

"We feel confident, however, that a denial of such power of appropriation is implicit in the decisions of this Court which we have cited and the constitutional principles they have established; that a contrary conclusion would expand the clause beyond its nature and context and make it a glaring exception, completely undermining the intended scope of our Federal Government."

The disagreements as to the meaning of the great clauses of the Constitution, forming the basis for social and economic legislation, is the surest evidence of their flexibility. It will be an unfortunate day, if there is ever general agreement that the Nation's exercise of Federal power has reached its limit; that further changes, however desirable or needed, cannot be accomplished without the uncertainties, delays and difficulties, of fundamental constitutional amendments. There are, of course, structural provisions which need little consideration. They are accepted by all.

The principle that the national government can exercise only those powers delegated to it by the Constitution, and the correlative doctrine that the powers not granted are reserved exclusively to the States or people, are as firmly settled as the Constitution itself. That they are doctrines whose vigor has not been lost with time is amply demonstrated by two decisions of the current term. In *Hopkins Federal Savings and Loan Association v. Cleary*, 296 U. S. 315, decided December 9, 1935, Justice Cardozo, speaking for a unanimous Court, pronounced anew the inviolability of State autonomy. The case involved the power of Congress to authorize the conversion of a State corporation into a national one, over the protest of the creating State. In upholding the objection of Wisconsin, the Court said the State "repulses an assault upon the quasi-

public institutions that are the product and embodiment of its statutes and its policy." In *United States v. Butler*, 297 U. S. 1, the Supreme Court again made clear, in no uncertain terms, that any legislation which is to be regarded as an interference with the domain of state control would meet prompt and effective disapproval from that body.

The continued vitality of the constitutional guaranty of separated authority within the Federal Government is, similarly, made emphatically clear by recent decisions of the Court. A mere reference to the sharp halt called to delegations of legislative power in *Panama v. Ryan*, 293 U. S. 388 and *Schechter Corp. v. United States*, 295 U. S. 495, and to the exercise of executive power in *Humphreys v. United States*, 295 U. S. 602 is sufficient. Certainly the Supreme Court will be very careful not to extend judicial power so as to infringe on that of the coordinate branches.

It is obvious that a reservoir of unused power, of indeterminate area, remains to the Federal Government within the limits of the delegated powers. This area becomes one which is broad indeed when viewed together with the scope of the implied powers which may be necessary to make fully effectual the expressly granted powers. As implied powers may be derived from implied powers, *Rupert v. Caffey*, 251 U. S. 264, 299, an even wider range for legislation is opened. The result is, as Justice Holmes, speaking for the Court in *Missouri v. Holland*, 252 U. S. 416, has phrased it, that "in matters requiring national action, it is not lightly to be assumed that 'a power which must belong to and somewhere reside in every civilized government' is not to be found."

Though I am one who most deeply regrets the result of the *Butler* case, I find very real cause for hope in the future in the language of Justice Roberts upon the welfare clause. I quote:

"It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. . . .

"As elsewhere throughout the Constitution the section in question lays down principles which control the use of the power, and does not attempt meticulous or detailed directions. . . . When such a contention (of unconstitutionality) comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress. How great is the extent of that range, when the subject is the promotion of the general welfare of the United States, we need hardly remark."

It would not be surprising, if from this holding of *United States v. Butler*, 279 U. S. 1, supplemented as it is by the vigorous and cogent reasoning of Justice Stone, Brandeis and Cardozo, there will flow an important line of decisions validating Federal legislation in the fields of agriculture, social welfare and labor relations. Such a development is believed by many essential to preserve the true spirit of American constitutional government in the changing phases of national life.

Certain legislation of the Congress affecting social and economic conditions of vital importance to the people of America are under attack in the courts. These include the Holding Company Act, the Securities and Exchange Act, the Wagner Labor Relations Act, the Social Security Act, the Act establishing the Federal Emergency Administration of Public Works and its successor, the Emergency Relief Appropriation Act of 1935. The general purpose of these acts is

understood by all. Under the well recognized powers of Congress to legislate to prevent industrial interruptions with or impeding interstate commerce (the first and second *Coronado* cases, *Board of Trade v. Olsen*, 262 U. S. 1, *Bedford v. Stone Cutter's Assn.* 274 U. S. 37), Congress has undertaken to further collective bargaining. The argument will be made that *Carter v. Carter Coal Company* decided May 18, 1936, has settled the right of Congress to legislate in labor matters, adversely to the validity of the Wagner Labor Relations Act. The Supreme Court, the Government contends, has not passed upon the question of the right to regulate collective bargaining in intrastate operations under acts utilizing the admitted Congressional power of protecting interstate commerce. The power is recognized, of course, in interstate matters. It has passed the test of the Fifth Amendment. The Supreme Court said in *Texas and New Orleans RR Co. v. Railway Clerks, etc.*, 281 U. S. 548:

"Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 209. Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both. . . ."

The litigation over the Holding Company Act will determine whether interstate communication facilities may be used for the carrying on of businesses disapproved as contrary to the public interest by our representatives in Congress and whether the Commerce clause itself, is sufficiently broad to include holding company operations, covering large sections of the nation.

The present field of constitutional controversy is not confined to the regulatory activities of the federal government in regard to labor and social relations. Attacks may come upon the constitutionality of the Reconstruction Finance Corporation Act, on the ground that the Federal Government has no power to appropriate and spend money for the assistance of banks, railroads, insurance companies and industrial operation. There may be an attempt to invalidate the Federal Deposit Insurance Corporation, the Home Owners Loan Corporation or the Farm Credit Acts for much the same reasons. The uniform recognition by the Supreme Court of the fiscal powers of the federal government makes it improbable that these attacks can meet with success, but they serve to illustrate the wide range covered by the discussion and litigation of the constitutional questions.

Related questions are presented by the litigation over the power of the federal government under the welfare clause to lend money for the construction of public utilities, to make the other investments of the Public Works Administration and to carry on the activities of the Works Progress and Resettlement

Administrations. Only the Supreme Court can finally resolve the differences of opinion which have arisen regarding the constitutionality of some aspects of these new federal activities.

Few dissent from the ultimate aim of social and economic legislation of the past few years. Old age and unemployment assistance, relief to distress, aid to labor in its struggle for recognition, bank insurance, the protection of investors, wide dissemination of opportunities for the utilization of electric power, the protection of children, have a strong appeal to the mind and heart of America. Surely the founding fathers, who provided for federal control of Commerce with the Indians, who limited the importation of slaves, protected the citizen against the abuses of the writ of habeas corpus, safeguarded contracts, protected property from seizure for government use and the citizen from arbitrary punishment for crime, could not have intended their government to be helpless in the emergencies of today. We have attained political freedom. We move towards social justice. It cannot be that the effort to attain that ideal may fairly be pilloried as contrary to the Constitution or as subversive of the American system of government.

The opportunity and the necessity for the Government's service to its people cannot be confined within rigid limits. The Constitution sets no such bounds. It is a living, vital institution whose function is to guide and not to curb necessary governmental processes. So to construe and apply our organic law, to adapt its powers to the great ideal of social justice for the governed, is truly to preserve, to protect and to defend the Constitution of our United States.

Opinions of Professional Ethics Committee Published in Book Form

THE Opinions of the Committee of the American Bar Association on Professional Ethics and Grievances together with the Canons of Professional Ethics and the Canons of Judicial Ethics, annotated with notes of the opinions in which they have been referred to, has just been published by the American Bar Association. The Committee was first authorized "to express its opinion concerning proper professional conduct when consulted by members of the Association or by officers or committees of state or local bar associations," at the San Francisco meeting in 1922, and the present publication contains all opinions from that time down to March 1, 1936. A complete index is a helpful feature of the new volume.

The publication of this book is a significant step toward the better understanding, observance and enforcement of the standards of professional and judicial conduct, and no one interested in the subject should fail to obtain a copy. Although the enforcement of professional ethics and discipline is primarily the province of the State and local Bar Associations, the American Bar Association, through its representative Committee on Professional Ethics and Grievances, furnishes an invaluable national leadership, particularly in the declaration and interpretation of the recognized standards. Subsequent Opinions, changes in the Canons, and revisions of the indices, will be published from time to time in pocket-supplement form, to be kept in a pocket in the cover of the present volume until a second volume is printed. The volume and its supplement will thus constitute an indispensable handbook on the subject.

DOES BUSINESS INEFFICIENCY OF ATTORNEYS CAUSE BUSINESS TO PRACTICE LAW?

It is a Mistake to Rely Solely upon Legal Remedies for Unauthorized Practice—These Should Be Supplementary to More Fundamental Reforms—If Bar Can Establish the Truth That Licensed Practitioners Are More Competent to Practice in the Invaded Fields Than Others, the Problem Will Be Solved, etc.

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THE reason for elimination of unauthorized practice of law is fundamentally the same as for other reforms of the bar. It is the need of a standard of professional ability and ethical conduct on the part of those who practice law.

There are three interests to be considered: (1) The interest of society, (2) the interest of clients, and (3) the interest of lawyers. The interest of society demands that those who elaborate the scheme of justice have knowledge of the social good, and be prompted by ethical considerations to protect society from the depredations of ruthless individuals. The interest of clients demands that those who advise them be learned in the law, and that they be bound by canons of professional ethics, which will insure undivided loyalty to clients. The interest of lawyers is to be members of a learned and honorable profession, of which they are proud. If persons who are permitted to practice do not measure up to the standards of the profession, then, although they are not technically termed lawyers, they degrade the legal profession, because they are lawyers in fact, doing the work of lawyers.

The objection to unauthorized practice through the agency of qualified lawyers is believed to be the same in principle as that to unauthorized practice in person. A layman is better able to practice law through the agency of a lawyer than he is to do so by himself. If, however, the contract of the client is made with the layman, even though it is executed through the agency of a lawyer, it is the layman who is practicing law, and his deleterious influence upon the conduct of the law business is bound to be felt. The quality of professional work suffers where the lawyer is subject to the economic power of a master who is not qualified to perform any legitimate function to assist him, and whose power is not restrained by any code of professional ethics. The capabilities and inclinations of the master will permeate the law business of which he is in charge, and will largely determine its quality.

Whether the case is one of unauthorized practice in person or of unauthorized practice through the agency of a lawyer, the formal argument against it is as follows: (1) This is a matter the handling of which calls for legal ability and ethical principles; (2) it should, therefore, be permitted to be handled only by persons having such ability and principles; (3) it should, therefore, not be permitted to be handled by persons who are not licensed to practice law. In general courts are concerned only with the first of the above steps, i. e., the determination of whether the matter under consideration calls for legal ability or ethical principles. If it is so decided, then it is established

either by statute or judicial precedent that the conclusions that only qualified persons should be permitted to handle the matter, and that the possession of a license is the test of qualification, follow as of course.

The premises implicit in these conclusions are (1) that persons who do not have legal ability and ethical principles should be prohibited by law from handling matters calling for such ability and principles, i. e., that clients should not be free to mess up their own business if they desire, and (2) that the test by which to determine whether a person possesses such ability and principles is whether he is licensed to practice law. I shall discuss the soundness of these premises later in this article. Their application by the courts may be reviewed briefly.

Assuming that matters calling for legal and ethical training should be handled only by members of the bar, the single question presented to the court in each instance is whether the particular case involves matters calling for legal and ethical training. Frequently, however, this inquiry is obscured by questions that are incidental to the particular instance of unauthorized practice. In the case of unauthorized practice through the agency of lawyers the main question is likely to be a question of such agency, not of the law of unauthorized practice. For instance, in the case of employment of an attorney by a lay trustee, the question is whether the trustee acts in a trust capacity or in a personal capacity. In the one case the trustee is a client, in the other the trustee is a layman practicing law.¹

Circumstances that attend many cases of unauthorized practice are likely to be assigned as the fundamental reasons for prohibiting it. It is said that the confidential relationship between attorney and client is destroyed by an intervening lay practitioner. But a corporation may permit its lawyer agents to do all of the actual contacting of clients—reserving for itself only the right to share in fees. Again, it is said that the lay principal solicits business. This accusation is frequently true, but solicitation is not an inevitable attendant of unauthorized practice. A business establishment may solicit only legitimate business, such as trusteeships of various kinds, trusting that legal business will flow to it as an incident to other kinds of business.

Many Courts resort to the proposition that statutes do not permit corporations to obtain law licenses, as a ground for prohibiting corporations from practicing law. The maxim "*Quando aliquid prohibetur ex directo,*

1. *Re Otterness*, 181 Minn. 254, holding that a bank conducting foreclosure sales as trustee through an attorney whose fees it shared was practicing law.

prohibetur et per obliquum" is then quoted.² This reasoning is dubious, since the fact of agency might conceivably remove the grounds of prohibition. Also, no reason is seen why a corporation, per se, could not practice law. Partnerships cannot be admitted to the bar as such, yet to say that partnerships do not practice law is to ignore the facts. The real objection is that corporations are composed mostly of laymen.

Apart from such logical vagaries, there is room for dissent from many judicial applications of the law of unauthorized practice. It was said in *Re Eastern Idaho Loan & Trust Co.*, 49 Idaho 280 (1930), 73 A. L. R. 1323, that "mere clerical filling out of skeleton blanks or drawing instruments of generally recognized and stereotyped form" does not constitute the practice of law. This may be true if the services are paid for as clerical services. If however the person performing the services is paid for his ability so to fill out a form as to accomplish a particular legal result, then it is submitted that he is paid to practice law. If knowledge of how to effect certain legal relations is so simple that no particular training is necessary to acquire it, then it should not be worth charging for.

In the case of *People v. Title Guarantee & Trust Co.*, (1919), 272 N. Y. 336, Judge Pound declared that where the preparation of legal papers is "ancillary to the daily business of the actor," and not "the business itself," then it is not practicing law. This dictum was the basis of a subsequent New York decision,³ and the same line of reasoning seems to run through other decisions. The poor lawyer, who relies solely upon his law practice for a living, must go through a rigorous course of training, and meet set standards of qualification before he can practice. His neighbor corporation can do ten times the volume of law practice without any professional qualifications, because it is fortunate enough to have in addition to its law business a large business of another kind. Can this be true?

A number of decisions have involved practice before administrative or quasi-judicial boards. Such boards are becoming increasingly important in the application of public law. This kind of law requires profound training more than private law. Yet the practice before these boards is chiefly dominated by laymen, whose sole qualification consists of the opinion of the board that they are of good character, good repute, and possessed of necessary qualifications to render valuable service.⁴

A distinction that has been taken in the law controlling the practice before such boards follows the distinction between boards that are technically administrative and boards that are technically judicial in character.⁵ This distinction is plausible, but the writer feels that it is a departure from the test of unauthorized practice suggested at the beginning of this article. Either kind of board may be composed of laymen, but so are many courts of justices of the peace. An administrative board may determine its conduct by rules of law as well as a judicial or quasi-judicial board. The difference between administrative and judicial tribunals is the theoretical manner in which they act upon their de-

cisions—not the nature of their decisions. The test for qualifying practitioners here, as elsewhere, should be based upon the nature of the questions to be decided—i. e., whether they call for legal and ethical training.

The most frequent application of the law of unauthorized practice has been in cases involving the collection of claims. Under this head come collection agencies, credit insurance associations, law lists. The activities of collection agencies may consist of advertising that they give, and giving, legal advice in commercial matters, the institution of legal proceedings, threatening suit, compromising claims, soliciting business for associated attorneys, representing creditors in insolvency and bankruptcy proceedings, and even participating in and dominating the association of lawyers themselves in the Commercial Law League.

No one will question decisions holding that the giving of legal advice⁶ or the actual institution of legal proceedings⁷ is practicing law. The threatening of suit has been held to be practicing law.⁸ It is believed that this is the correct view since we are here dealing with a higher standard of conduct than ordinary criminal law, and the threat of unlawful force should be on a par with the act. Threat of suit is often as effective as suit and is one of the lawyer's chief weapons. It can only be used properly by one who can judge of the chances of success, and who can advise his client when to yield and when to press. The compromising of claims combines giving legal advice and threatening suit, and should constitute unauthorized practice when performed by a layman.

A special function of collection agencies is the representation of creditors in insolvency proceedings, where they control the appointments of receivers and election of trustees, make composition settlements, and determine the policies of creditor groups in reorganization activities. The recent case of *Rinderknecht v. Toledo Association of Credit Men*, 13 F. Supp. 555, sustained the right of such agencies to solicit and present claims and participate in the election of a trustee in bankruptcy. Of solicitation the court said "As a lay action, it is not intrinsically obnoxious. . . ." It is submitted that the court assumed the decision of the fundamental question of whether the business to be solicited was law business, in favor of the agency. Would any one contend that a lay agency can solicit law business?

Another distinction attempted by the court was between bankruptcy and other insolvency proceedings. It was said that bankruptcy involves the policy of "expeditious, economical, and just administration" of estates more than other proceedings, and, therefore, lay activities are permissible in bankruptcy that would not be permissible in other proceedings. This distinction, however, ignores one of the fundamental premises of the law of unauthorized practice, namely, that lawyers are better qualified to practice law than laymen. If laymen can administer justice more expeditiously, economically and justly than lawyers, then their services should not be confined to bankruptcy proceedings. On the other hand, if lawyers can administer justice more expeditiously, economically and justly than laymen, then, if the policy for thus administering justice is greater in

2. *Re Cooperative Law Company* (1910), 198 N. Y. 479, 32 L. R. A. (N. S.) 55.

3. *People v. Title Guarantee & Trust Co.*, 181 N. Y. S. 52.

4. See *Lawyers and Practitioners: A study in contrasts* by William H. Robinson, Jr., *Am. Bar Association Journal*, May, 1935, page 279.

5. *Engineering Co. v. Harlem French Cleaning & Dyeing Works* (1927), 132 Misc. 687, 230 N. Y. S. 670.

6. *Grocers & Merchants Bureau v. Gray* (1915), 6 Tenn. C. C. A. 87.

7. *Abercombie v. Jordan*, 8 Q. B. D. 187, 30 W. R. 810, digested 84 A. L. R. 746-7.

8. *LeBarreau De Quebec* (1927), *Rap. Jud. Quebec*, 66 C. S. 235, digested 84 A. L. R. 754.

bankruptcy than in other proceedings, there is special reason for restricting the conduct of bankruptcy proceedings to lawyers.

Bankruptcy from the viewpoint of creditors, is only a particular method of collecting claims. Most defenses to a claim that may be presented in an ordinary court may be presented in bankruptcy—and a good many additional ones. Legal advice to claimants is as necessary for claims collected through bankruptcy as for other claims, and no basis for a distinction in the matter of practicing law is seen.⁹

Certain devices are resorted to by credit agencies in order to evade the law of unauthorized practice. A common one is credit insurance organizations, whose contracts provide for collection of the accounts they insure at the expense of their assureds, and the retention of a part of the collection fee by the insurer. This is only a kind of *del credere* collection agency, which is practicing law as much as others.

Another device is the purported assignment of claims to the agency by creditors. Such a device was sustained in *Cohn v. Thompson*, 128 Cal. App. (Supp.) 783, 16 P. (2d) 364. The decision of *State v. James Sanford Agency* (Tenn. 1934), 69 S. W. (2d) 895, 898, in which the court refused to be diverted from substance by the form of an assignment, seems to be more sound.

About the only legitimate function of lay organizations with reference to the collection of claims seems to be the preparation of authentic law lists. If law list companies degenerate into mere forwarding agencies, then, while they are not practicing law, they are soliciting business for lawyers. On the other hand, it is generally agreed that lists of this kind, if properly managed, are a useful, and even essential means of making available information with respect to out-of-town lawyers.

At the present moment the drama of Hamlet's line "To be or not to be" is being played by a medley of players from the American Bar Association and representatives of Law Lists. Missouri has dealt drastically with the law list problem. The propriety of driving a procedural method long looked upon by lawyers as ethical out of existence is debatable. Lawyers who function for commercial organizations frequently have to forward matters, sometimes collections, to lawyers situated in remote places of the country. Dispatch in handling may determine the success or failure of the item entrusted to your care. Time does not permit a thorough personal investigation of the attorney to whom it is forwarded and one must rely upon the "Who's who periodicals"—which frequently are incorrect. Theoretically all attorneys are men of action and integrity, perseverance and intelligence, but a man who handles forwarding business knows that as a practical proposition, they are not. The lack of business and professional decorum of the lawyer in handling strictly business matters of this character presents an almost irresistible argument in support of the big stick of the bonded lists and lay agency control.

Other forms of unauthorized practice present similar questions to those discussed. Common instances are the organizing of corporations by lay agencies, the

drawing of papers by real estate agencies—who may act for both sides of the transaction, the compromising of insurance claims by lay adjusters, the collection of claims by unlicensed justices of the peace, either in their own right, or as the tools of collection agencies.

There are ample judicial remedies for infringements of the law against unauthorized practice. In *Rhode Island Bar Association v. Automobile Serv. Association*, 179 A. 139, it was held that a statute authorizing the Rhode Island Supreme Court to regulate the practice of law was "declaratory of the power inherent in this court to control and supervise the practice of law generally, whether in or out of court." The court accordingly had jurisdiction to adjudge in contempt of court a corporation guilty of unauthorized practice.

In this case the court held that a statute making unauthorized practice a criminal offense did not impair the court's inherent jurisdiction to punish by contempt. Such criminal statutes are common. See Section 9983 (2) for a Tennessee criminal statute. These statutes generally impose only a small penalty for any one offense, and consequently are not so effective as civil remedies.

A Tennessee statute under which an injunction may be had against persons guilty of unauthorized practice is section 9316, 1932 Code, which provides that the unlicensed practice of any business or profession required to be licensed may be enjoined as a nuisance. Injunctions were granted under this section in *State ex rel v. Credit Men's Assn.*, 163 Tenn. 45, *supra*, and *State v. James Sanford Agency*, 69 S. W. (2d), 895, *supra*.

In each of the above cases relief was also asked in the nature of quo warranto under section 5165, et seq., Shannon's 1917 Code (Sect. 9336, et seq., 1932 Code), for a dissolution of the offending corporation for abuse of its franchise (See Sect. 9352, 1932 Tenn. Code), but the court refused to apply this more drastic remedy. Chief Justice Green indicated in *State ex rel v. Credit Men's Ass'n.*, *supra*, that this might have been done if the abuse of corporate power had been wilful.

Where unauthorized practice is conducted through the agency of a lawyer, judicial proceedings are frequently directed against the lawyer, who is accessory to the practice, as well as against the lay principal.¹⁰ As yet the writer knows of no court that has gone further than to censure the guilty lawyer, but disbarment might well be applied in an aggravated case.

The judicial remedies for unauthorized practice seem theoretically sufficient. The wisdom of resorting to them, however, and their effectiveness, are debatable. It is necessary to revert to the syllogism that has been previously proposed as the basis for the law of unauthorized practice.

The first question relates to the soundness of the premise that governments should compel matters calling for legal ability and ethical principles to be handled only by persons having such principles and ability. Is this a matter where the interest of society in the proper administration of justice is so strong that society must reserve the right to judge of its own interest, even though, as has been pointed out, the interest of society is identical with the interest of clients in demanding competent and ethical legal practitioners? Is the unauthorized practice of law analogous to the illegal drug traffic or is it analogous to the (formerly illegal) liquor traffic? Governmental prohibition has been successful

9. For a case holding that state law relative to unauthorized practice applies to bankruptcy proceedings see *L. Meisel & Co., v. National Jewelers Board of Trade* (1915), 90 Misc. 19, 152 N. Y. S. 913; and the recent decision in *Depew et al. Wichita Assn. of Retail Credit Men.* — Kans. —, — P. (2d) —, certiorari denied by U. S. Supreme Court.

10. *In re Pace* (1915), 156 N. Y. S. 641.

in the former case, but in the latter it has had to bow to the will of the individual to go to the devil in his own good way—a result that was accepted by the American Bar Association.

Much may be said for the proposition that the prohibition of unauthorized practice by governmental means may prove as much a white elephant as the prohibition of liquor. Certainly the large demand for the services of unauthorized practitioners is a fact that cannot be disregarded, and it is sufficient to raise a question as to the wisdom of attempting to ride roughshod over a considerable part of public opinion by enacting laws against the practice.

The second assumption of the campaign against unauthorized practice is that persons who have received law licenses are better qualified to practice than persons who have not. If this proposition is not correct, then a demand for qualified practitioners by the interests of society, clients and lawyers does not necessarily imply a demand for practitioners who have been admitted to the bar.

The profession would do well to make sure of its ground by a thorough self-examination before undertaking to lead an attack upon others. The results of such a self-examination will not be entirely satisfying to the supine, better-than-thou spirit in which much of the campaign against unauthorized practice is conducted. It is not altogether the blindness of the dullard public to its own self interest that is responsible for the success of lay agencies in competing with lawyers. It is because the theoretical proposition that lawyers perform legal functions more proficiently than laymen, which is presupposed by every argument against unauthorized practice, does not, as a matter of fact, obtain in every instance.

The decision in *Rinderknecht v. Toledo Ass'n of Credit Men*, supra, which I have criticized as reaching an unsound theoretical result in permitting credit agencies to represent creditors in bankruptcy proceedings, was based chiefly upon judicial notice of the practical superiority of credit agencies in performing services which lawyers theoretically are better prepared to perform. The court said:

"From extensive connection with bankruptcy administration in 18 years of activity in this large commercial district, in both of its divisions, we select the two most flagrant and abominably crooked bankruptcy administrations we have noted to say that the functioning of each might have been clean from the beginning had the referee or the court had the aid of a critical and usefully advisory institution such as the defendant association is known to us through our past contacts with it."—13 Fed. Supp. 558.

Lawyers are pleading for the support of the courts in their fight against unauthorized practice. The above-quoted case illustrates a major defect in their plea. When the public indicates a preference for lay agencies, lawyers may save their faces by ascribing the preference to ignorance. When this same preference appears as a matter of judicial notice in court decisions, it can only mean that lawyers have fallen short of the ideal set for their profession.

Instances of the shortcomings of the bar that have decreased the confidence of the public and the bench in lawyers are everyday occurrences. The breaches of conduct that are undermining the claim of lawyers to an exclusive right to practice law are numberless. They vary from actual fraud upon clients to mere inefficiency in the handling of legal matters. It is a fact that corporations which enter the field of law are more efficient than lawyers in the routine matters. No little of the

distaste of laymen for lawyers results from the carelessness and laxness of lawyers. No little of the appeal of lay agencies results from their contrasting diligence.

It is not sufficient for lawyers to howl to high heaven the faults that unauthorized practitioners undoubtedly have. If they are to win, they must recognize dispassionately the good qualities of many unauthorized practitioners, and must copy them where they can. They must step up the pace of the law business to meet the practical needs of the swiftly-moving world that it serves.

Having already discussed the efficacy and expediency of remedies for unauthorized practice that have been devised by courts and legislatures at the instance of the bar, it is believed doubtful that these remedies will prove adequate, and that it is desirable to resort to law to enforce a monopoly of the practice of law in favor of licensed practitioners. Whether justly or not, the reliance of the bar upon legal weapons to combat unauthorized practice will be construed by many as an admission of inability to compete upon the stern terms of the law of supply and demand that eliminates the unfit in other walks of life.

It is not recommended that all legal remedies for unauthorized practice be rejected. It seems, however, that it is a mistake to rely solely, or even principally upon them. They should be supplementary to more fundamental reforms. If the bar can establish the truth of the proposition that licensed practitioners are more competent to practice law than others, the problem of unauthorized practice will solve itself with little help from courts or legislatures. The question of whether the public should be allowed to judge of its own interest will become moot. Emerson's mouse-trap proverb may be cited on this proposition. In conclusion, may the closing remarks of the Honorable Charles A. Beardsley, past President of the State Bar of California, in his article,¹¹ "Lay Encroachments," published in the American Bar Association Journal be quoted:

"Seeing that Cain was troubled by Abel's encroachments upon Cain's favor with the Lord, the Lord did not say unto Cain, you should slay Abel, or you should have him arrested, or you should talk straight from the shoulder to him, or you should holler at him. The Lord said unto Cain (Genesis, fourth chapter, seventh verse): 'If thou dost well, shalt thou not be accepted?'"

William Shankland Andrews

William Shankland Andrews, former judge of the Court of Appeals of New York State, died at his home in Syracuse on the 5th of August, only three days after the death of his wife, Mrs. Mary Raymond Shipman Andrews. Judge Andrews had a long and distinguished career, serving on the Supreme Court of New York and the Court of Appeals bench for more than thirty-five years. After a courageous opinion in 1921 holding the state soldiers' bonus issue unconstitutional, he was renominated to the Court of Appeals bench by the Republican convention three weeks later, and was reelected over former Supreme Court Justice Townsend Scudder in a battle where the preservation of the independence of the judiciary became the main issue, Judge Andrews being publicly supported by many outstanding Democrats. His involuntary retirement from the court in 1920, because he had reached the legal age limit of seventy, was pronounced a "tragedy" by Chief Justice Cardozo, who then said that "Judge Andrews during the past two years has written some of the greatest opinions ever uttered by this court."

11. Am. Bar Ass'n Journal, March, 1931, p. 189 at p. 193.

SPECIAL PHASES OF THE "OMNIBUS CLAUSE" IN INSURANCE POLICY

The Omnibus Clause, Providing That Assured Shall Include Any Person Legally Using the Automobile with Permission of the Named Assured, Is a Creation of the Past Ten Years—Because It Is New, Decisions Have Been of First Impression—Most of Them Accord with Soundest Principles of the Common Law, but Others Extend over Unreasonable Rules and Arrive at Peculiar Results—Meaning of the Word "Permission" and Conditions under Which It Exists etc.

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"Assured shall include any person legally using the automobile with the permission of the named assured."

General Type of Clause

FEW attorneys yet realize that nearly half of the suits instituted in lower courts of record and fully one-fourth of appealed cases deal with questions of automobile law. One need only glance at the voluminous encyclopedic law prepared by competent writers to realize the importance and bulk of this subject. New problems are constantly arising and new methods of approach are being developed by the courts.

It is an inevitable conclusion from reading current editorials and articles that the public is beginning to demand that drivers be licensed, and that when licensed they be insured with some responsible company. The statutes of thirty-five states and the District of Columbia have partially met this demand by requiring operator's licenses. Twenty-eight states and the District of Columbia have financial responsibility laws of one type or another. The questions of automobile law and of liability and indemnity insurance have become so closely interlocked that a discussion of one has usually involved the other. It is largely because of the inability of courts to dissociate questions of liability from the fact of insurance that many freakish decisions have sprung up. Few judges have been able to keep a normal balance in the presence of daily verdicts in the thousands of dollars. Courts have varied from a strict legal interpretation of insurance contracts to an opposite extreme of "Soak the insurance company." The result is that many inconsistent decisions and much bad law has been established in the space of a few years. All sorts of queer doctrines of law exist which can be stretched at will by the enunciating court.

What is the result? A suit-minded type of individual has been developed who sues immediately for the slightest personal injury or property damage, overburdening courts with an unpleasant and expensive type of litigation. It has forced insurance rates of responsible companies up and up to exorbitant minimums, and brought into being hundreds of tiny cut rate companies which flash into being for a few years, and, when their claims catch up with them, as quickly disappear. When insurance rates are doubling and trebling in certain states and insurance companies are withdrawing from other states because of the attitude of courts and

juries therein, it is apparent that some definite change must come.

This change must start with the courts who have it in their power to shape the future development of insurance protection for the people in their state. One wild decision interpreting a guest statute, one gross error in reasoning could well mean a fifty percent rise in insurance rates or the withdrawal of responsible companies. No company is better than its loss ratio and when the loss ratios of the soundest automobile insurance companies are already up to 100% it must be realized that new losses cannot be absorbed out of profits which do not exist. Rates must continue to rise, and they will do so until a drastic change in the attitude of courts becomes apparent.

The omnibus clause is a creature of the past ten years. It became desirable, as more and more people learned to drive, that the owner of the assured automobile be permitted to allow third persons to drive and that such protection afforded by the insurance be extended over to them. Because this clause is so new, decisions have been largely of first impression. Most of them accord well with the soundest principles of common sense. Others extend over unreasonable rules of law and arrive at peculiar results.

It must be remembered, furthermore, that the omnibus clause is not the only controlling clause in a policy. Even though protection would normally extend over to cover a person driving, if that person is one excluded from coverage by the policy or if the use to which the vehicle is put is prohibited by the policy, such exclusions are almost unanimously held paramount over the omnibus clause. For example, when there are clauses excluding coverage when the assured automobile is pulling a trailer, or where a public garage or place of repair is excluded, or where business use only is covered and at the time of the accident the use is purely for pleasure purposes, then the omnibus clause is considered not to operate in the great majority of cases. Treatment of these numerous legal points would require at least a volume and will not be discussed at all in this article. It is the purpose of the writer to point out only where permission is construed to exist under the omnibus clause so as to insure other persons than the named assured.

The first important question arises in determining the meaning of the word permission and the conditions under which it exists. What is permission? Who has the burden of proof of showing it? When is it implied?

The answer to these questions will necessarily be involved throughout this discussion. Briefly, however, the results can be summarized to some extent. The plaintiff has the ultimate burden of affirmatively showing permission in the ordinary case.¹

Iowa illustrates a common attitude in placing the original burden upon defendant. The presumption is made that one who drives another's car drives it with the owner's permission. As soon as this presumption is rebutted by any satisfactory evidence, the burden shifts to the plaintiff who must thereafter sustain it.² In other words, the burden of going forward is upon defendant and the burden of proof upon plaintiff who has the benefit of a prima facie case. A number of other jurisdictions hold that proof of ownership of the assured automobile raises a rebuttable presumption that it is being used with the owner's consent.³

Permission may be implied from past and present conduct of the assured or some other person who has authority to grant permission to use the car. A mere belief, although, in good faith, on the part of the borrower that he has permission is not sufficient.⁴ In the absence of actual written or oral permission there must be definite acts or conduct of the assured which would lead a reasonable man to believe that consent was intended.⁵ Even though the assured did not intend to grant permission, his conduct might constitute an estoppel.⁶

1. *Bohumil Soukop v. Anton Halmel et al (Anton Halmel v. Motor Vehicle Casualty Co.)* (1934) 357 Ill. 576, 192 N. E. 557. "The proof of such permission lies at the foundation of plaintiff's right to recover under the policy. Unless and until that fact was proven, there was no duty on the part of defendant to establish any defense under the policy. The burden of proof rested upon plaintiff to establish that Anton was covered by the policy." Cases which seem to support this finding by at least dicta include *Frankel v. Allied Mutuals Liability Insurance Co., Didophy v. Same* (1934—Mass.) 192 N. E. 517; *Sauriolle v. O'Gorman* (1932) 86 N. H. 39, 163 A. 717; *Kasdan v. Stein* (1927) 118 Ohio St. 217, 160 N. E. 506; *Collins v. Northwest Casualty Co.* (1935) 180 Wash. 347, 39 P. (2) 986; *Union Indemnity Co. v. Small* (1930) 154 Va. 458, 153 S. E. 685; *Bro v. Moran et al* (1927) 194 Wis. 293, 215 N. W. 431; *U. S. Fidelity and Guaranty Co. v. Mann* (1934) C. C. A. 4th 73 Fed. (2) 465; *Fredericksen v. Employers Liability Assurance Corp., Ltd. of London, Eng.* (1928) C. C. A. 9th, 26 Fed. (2) 76.

2. *Heavilin v. Wendell* (1932) 214 Iowa 844, 241 N. W. 654; *Seleine v. Wisner* (1925) 200 Iowa 1389, 206 N. W. 130; *Baldwin v. Parsons* (1922) 193 Iowa 75, 186 N. W. 665; *Hall v. Young* (1920) 189 Iowa 237, 177 N. W. 694; *Landry v. Owersen* (1919) 187 Iowa 284, 174 N. W. 255; *Sultzbach v. Smith* (1916) 174 Iowa 704, 156 N. W. 673; *Reynolds v. Buck* (1905) 127 Iowa 601, 103 N. W. 946.

3. See Berry, C. P.—*Law of Automobiles* (7th Ed.) Section 4.492-5 *Blashfield—Cyclopedia of Automobile Law and Practice—Permanent Edition* Vol. 9 Section 6065 and cases cited therein.

4. *Bro v. Moran, ibid.*

5. *Tomasetti v. Maryland Casualty Co.* (1933) 117 Conn. 505, 169 A. 54. "When, as here, it is found that such prolonged, frequent, and habitual use was with knowledge and acquiescence of the owner, it must be regarded as amounting to an authorization and a permission within the policy." See also *Bohumil Soukop v. Halmel, ibid.*; *U. S. Fidelity and Guaranty Co. v. Hall* (1931) 237 Ky. 393, 35 S. W. (2) 550; *Hunter v. Irwin* (1935—Ia.) 263 N. W. 34; *Boyer v. Massachusetts Bonding and Indemnity Co.* (193) 277 Mass. 359, 178 N. E. 523; *Andrews v. Commercial Casualty Insurance Company* (1935) 128 Neb. 496, 259 N. W. 653; *Powers v. Wells et al.* (1935) 115 Pa. Sup. Ct. 549, 176 A. 62; *Brower v. Employers Liability* (1935) 318 Pa. 440, 177 A. 826; *Maryland Casualty Co. v. Hoge* (1929) 153 Va. 204, 149 S. E. 448; *Odden v. Union Indemnity Co.* (1930) 156 Wash. 10, 286 Pac. 59; *Bowen v. Soucy* (1933) 2 Fed. Supp. 481; *Maryland Casualty Co. v. Ronan* (1930) C. C. A. (2) 37 Fed. (2) 550; *Georgia Casualty Co. v. Waldman* (1931) C. C. A. 5th 53 Fed. (2) 24; *Trotter v. Union Indemnity Co.* (1929) C. C. A. 9th 35 Fed. (2) 104; *Globe Indemnity Co. v. Nodlere* (1934) C. C. A. 10th 69 Fed. (2) 955.

Suppose that the assured, instead of being an individual, is a municipality or a corporation. What permission is effective to extend coverage to the borrower of a car? Where municipal regulations forbid use of cars for private purposes it has been held that such regulations are paramount over permission granted by any city official.⁷ It has been held where no such regulations exist that use for private purposes would be unpermissible as this would constitute a use of taxpayer's money for other than public benefit.⁸

The rule is much broader in the case of the ordinary business corporation. Here it is held that the official in whose department the assured automobile is used can grant permission to employees to use such vehicle for private business.⁹ One rather peculiar result is reached by a Federal Court in this connection.¹⁰ *Dagostin and Angelini, Bros.* was the assured. The president, Angelini, frequently gave his stepson, Lorry Moore, permission to use the car. One Sunday, Angelini, on leaving the city, gave Moore the keys to the car and told him that he might use it with his grandmother's permission. That night Moore asked permission of his grandmother to go joy riding, which she granted. An accident occurred in the course of the evening. While the court pointed out that implied permission might have been found from Angelini's past actions, it seems fairly clear that the decision permits a proper official to delegate his authority to grant consent to some outside person who has no connection whatsoever with the assured. If this result be followed elsewhere, it is difficult to see where liability would end. This is certainly beyond the contemplation of the average insurance policy.

There is, of course, more than one type of omnibus clause. There are only two important general types—the one given at the heading of this article and the other as follows: "The indemnity provided by this policy is so extended as to be available, in the same manner and under the same conditions as it is available to the named assured, to any person or persons while riding in or lawfully operating any of the insured automobiles, and to any person, firm, or cooperation legally responsible for the operation thereof, provided that such use or operation is with the permission of the named assured, or, if the named assured is an individual, with the permission of an adult member of the named assured's household other than the chauffeur or a domestic servant."¹¹

There is no difference in the two types of clauses

6. *Christianson v. Schenkenberg et al* (1931) 204 Wis. 323, 236 N. W. 109.

7. *U. S. Fidelity and Guaranty Co. v. Mann* (1934) C. C. A. 4th, 73 Fed. (2) 465; *Globe Indemnity Co. v. Nodlere* (1934) C. C. A. 10th, 69 Fed. (2) 955; *Fox v. Employer's Liability Assurance Corp. Ltd. of London, Eng.* (1935) 243 App. Div. 325, 276 N. Y. S. 917. This latter case, in prior hearings is found in 247 N. Y. S. 429, 268 N. Y. S. 536 and 196 N. E. 604. See also *Irolla v. The City of New York* (1935) 155 Misc. 908, 280 N. Y. S. 873 and *Jones v. The Town of Clarkson* (1927) 130 Misc. 57, 223 N. Y. S. 611.

8. *Fox v. Employer's Liability, supra*; *Aspinall v. City of New York* (1927) 221 App. Div. 753, 223 N. Y. S. 501; aff. 246 N. Y. 644, 159 N. E. 685; *Downing v. City of New York* (1927) 219 App. Div. 444, 220 N. Y. S. 76; aff. in 245 N. Y. 597, 157 N. E. 873.

9. *Peterson v. Maloney* (1930) 181 Minn. 437, 232 N. W. 790; *Stovall v. New York Indemnity Co.* (1928) 157 Tenn. 301, 8 S. W. (2) 473; *American Auto Ins. Co. v. Jones* (1932) 163 Tenn. 605, 45 S. W. (2) 52; *Maryland Cas. Co. v. Ronan, ibid.*; *Georgia Casualty Co. v. Waldman* (1931) C. C. A. 5th, 53 Fed. (2) 24; *Rice et al v. Phillips* (1934) 115 Fla. 409, 155 So. 723.

10. *Georgia Casualty Co. v. Waldman, supra*.

11. Italics author's.

except in one respect—that the latter clause extends over the powers to grant consent to persons other than the named assured. It qualifies this group and limits it to adult members of the assured's household. This, in itself, is fairly clear. An adult will be that person who has attained a legal majority in the state of his residence.^{11a} Such majority will be determined under this clause as in all other questions. A very pretty problem might arise where permission is given by a person who is considered an adult member of the household in state A and not such in state B. Supposing the borrower takes the assured automobile from state A to state B or vice versa—what law will determine whether or not the permission given to him is valid? Whereas the *lex loci delicti* governs most questions of substantive tort law this clearly does not fall within that classification. It is purely a matter of contract and would be governed by that law which the parties intended should control—i.e., the place of making of the contract, the residence of the parties, etc. However, for possible arguments to the contrary, see some rather recent federal cases.¹² Since in nearly every case, these various places would be identical, no question would arise, especially in view of the fact that at the present day the same definition of the phrase in question is adopted in nearly every state. The more serious question would not arise so much in connection with the definition of adult as in the member of the household element. So even though there might be universal accord in the definition of adult there might be universal disharmony in the latter connection.

It has always been a perplexing problem to define members of a household. It is clear that a casual visitor is not such, nor would an entire group of lodgers in a boarding house be included.¹³ The meaning of the terms as used in common parlance is usually, and wisely, employed. Those who dwell under one roof and compose a family—who have close ties of consanguinity or friendship constitute a household.¹⁴ It does not require that all of them be financially dependent upon the head thereof,¹⁵ nor does the payment of board by members of the family—e.g., adult children, affect the problem.¹⁶ If a person is married and the head of a separate household, he remains such while visiting another group and would not merge therein.¹⁷

Strangely enough, the rather absurd question of whether or not an adult member of a household can

grant permission to himself has been raised in some jurisdictions. It would seem, of course, that he can. This has been determined in several cases.¹⁸ This clause is a very unwise one in many ways. In the case of *Union Indemnity Co. v. Small*¹⁹ the Virginia court found that a drunken son had been refused permission to use the assured's car. The plaintiff had alleged that this son had the permission of his mother and his father. The proof failed to sustain this and the court held for the defendant stating: "The plaintiff saw fit to ground her right of recovery upon the permission given by M. P. Claud and Reese Claud. The question of whether or not, under the provision of clause K, Hugh Claud could grant himself permission to operate the automobile of M. P. Claud is not involved in this case." Thus a recovery was forbidden because of the very stringent and illogical reasoning of the court and the shortsightedness of the plaintiff's attorney. It is an unfortunate situation when the insurance companies voluntarily assume, by such a clause, liability where some drunken son, against his father's orders, will give himself or some equally drunken friend permission to operate the assured automobile.

When the assured rents or sells the assured automobile or gives to some third party by contract the right to use such car then such third person can use the automobile without the assured's permission. Since permission given under such circumstances would amount to a mere mouthing of words it is usually held that the omnibus clause does not operate.²⁰ To hold otherwise would be to impose a far greater liability than the insurance company intended to assume. Otherwise the insurance company might be totally ignorant of the persons really handling and manipulating the automobile and delegating the operation thereof. One interesting case was presented where A, the wife of a salesman for company B, owned an automobile. B used the automobile in its business and insured it in the name of the company. A permitted another salesman to use it for personal business, and while so engaged he had an accident. Since the insurance had been carried by B, the court held that the insurer could not be bound by the actions of A, the real owner.²¹ A very recent Wisconsin case accords with the rule in the Whitney case but examines the conditional sale contract to see whether title actually passed. The transaction proved to be a mere subterfuge and the insurer was held liable.²²

The effect of the assured's death raises an interesting question. Most policies provide that the legal repre-

11a. About the only cases in issue squarely are *Lucas et al v. U. S. Fidelity and Guaranty Co.* 113 N.J. L. 491, 174 A. 712; *Tomasetti v. Maryland Casualty Co.*, *ibid.* Some inferences can be drawn from the cases of *Bro. v. Moran*, *ibid.*; *Christiansen v. Schenkenberg*, *ibid.*; *Ocean Accident and Guaranty Corp. v. Schmidt*, *ibid.*; *U. S. Fidelity and Guaranty Corp. v. Hall*, *ibid.*; *Andrews v. Commercial Casualty Insurance Co.*, *ibid.*

12. *Scheer v. Rockne Motor's Corp.* (1934) 68 Fed. (2) 942; *Young v. Masci* (1933) 289 U. S. 253, 53 S. Ct. 599, 77 L. Ed. 158.

13. *Umbarger v. State Farm Mutual Auto Insurance Co.* (1934) 219 Iowa 203, 254 N.W. 87.

14. *Andrews v. Commercial Casualty Ins. Co.*, *ibid.*; *U. S. Fidelity and Guaranty Co. v. Hall*, *ibid.*; *Pearre v. Smith* (1909) 110 Md. 331, 73 A. 141; *Indemnity Insurance Co. of N. A. v. Sanders*, *Same v. Lahman* (1934) 169 Okla. 378, 380, 36 P. (2) 271, 274; *Collins v. Northwest Casualty Co.*, *ibid.*; *Union Indemnity Co. v. Small*, *ibid.*; *Poor v. Hudson Ins. Co.* 2 Fed. 432; *Ocean Accident and Guaranty Corp. v. Schmidt*, *ibid.*; *Arthur v. Morgan* 112 U. S. 495, 5 S. Ct. 241, 28 L. Ed. 825.

15. *Ocean Accident and Guaranty Co. v. Schmidt*, *ibid.*

16. *Andrews v. Commercial Casualty Insurance Co.*, *ibid.*

17. *Indemnity Insurance Co. of N. A. v. Sanders*, *Same v. La'man*, *ibid.*

18. *U. S. Fidelity and Guaranty Co. v. Hall*, *ibid.*; *Andrews v. Commercial Casualty Insurance Co.*, *ibid.* In *Maryland Casualty Co. v. Hoge* (1929) 153 Va. 204, 149 S.E. 448 it would have been a simple matter for the court to rest the case on this ground. Instead, a lengthy discussion as to whether or not implied permission existed is determined in the affirmative without the raising of this point.

19. *Ibid.*

20. *Whitney v. Employer's Indemnity Association* (1925) 200 Iowa 25, 202 N.W. 236; *Fagg v. Massachusetts Bonding and Insurance Company* (1933) 142 Ore. 358, 10 P. (2) 413. Both of these are cases of conditional sales contracts. See also *Giroud v. N. J. Manufacturer's Casualty Insurance Co.* (1930) 106 N.J.L. 238, 148 A. 790. The contrary view seems expressed by the cases of *Ocean Accident and Guaranty Co. v. Bear* (1925) 290 Ala. 491, 125 So. 676 and *Associated Indemnity Corp. v. McAlexander* (1935) 168 Tenn. 424, 79 S.W. (2) 556. The latter case is not a strong authority for the minority rule.

21. *Wigington v. Ocean Accident and Guaranty Corp., Ltd.* (1930) 120 Neb. 162, 231 N.W. 770.

22. *Fawcett v. Gallery et al* (Mar. 3, 1936—Wis.) 265 N.W. 667.

sentatives become the next assureds. Death, of course, revokes any special, general, or implied permission given by the deceased. Thereafter, the power of permitting such use rests only in the administrator appointed by the court.²³ Massachusetts²⁴ and Washington²⁵ hold that in the interim between the assured's death and the appointment of an administrator no one can legally operate such automobile. This seems to be a rather stringent interpretation of the policy and seems to require a payment of premiums while no protection is granted. When the household continues to exist as prior to the death of the assured, it would seem distinctly against public policy to permit liability to be waived upon such a technical interpretation as set forth in the Collins Case.

The question of defining permission is necessarily interlocked with that of determining the limits of permission granted to the borrower of the car. The decisions of the majority of the courts, in states where no statutory regulations exist on this matter, are to the effect that permission means a consent to use the car at the time, place, and under the circumstances of the accident. This third element requires that the purpose for which the car is used at the time of the accident be a purpose stated or intended at the time that the bailment is made. Maine,²⁶ New Hampshire,²⁷

New Jersey,²⁸ Ohio,²⁹ Oklahoma,³⁰ Pennsylvania,³¹ Washington,³² and the Federal cases³³ seem to hold this way. Louisiana³⁴ is very much on the borderline

it more convenient to leave New Jersey in the present classification, although it more properly belongs with Louisiana and Minnesota.

29. *Denny v. Royal Indemnity Co.* (1927) 26 Ohio App. 566, 159 N.E. 107; *Kazdan v. Stein* (1927) 26 Ohio App. 455, 160 N.E. 506, affirmed in (1928) 118 Ohio St. 217, 160 N.E. 704.

30. *Indemnity Insurance Co. of N. A. v. Sanders, Same v. Lahman.* (1934) 169 Okla. 378, 380; 36 P. (2) 271, 274.

31. *Powers et al v. Wells* (1935) 115 Pa. Super. Ct. 549, 176 A. 62; *Truex to use of Paul v. Pa. Manufacturers Associated Casualty Insurance Co.* (1935) 116 Pa. Super. Ct. 551, 176 A. 756; *Brower v. Employer's Liability Assurance Co., Ltd. of London, Eng.* (1935) 316 Pa. 440, 177 A. 826. These Pennsylvania cases are well reasoned upon the factual background and are very quotable.

32. In *Odden v. Union Indemnity Co.* (1930) 156 Wash. 10, 286 P. 59 the court allowed a recovery upon the basis of implied permission. It seemed that the court was over liberal, but the facts were strong enough to justify the result. The decision in *Cypert et ux v. Roberts* has a much more common set of facts. Here the borrower failed to return the car in the morning when requested, and was using it in the afternoon for a purpose permitted under the original bailment but after the time of the original bailment has expired. The court stated "that she did not have such permission, express or implied, to use the car at the place, at the time, and under the circumstances, or for purposes existing at the time of the collision, was clearly established and must be so held as a matter of law." (1932) 169 Wash. 33, 13 P. (2) 55.

33. *Bowen v. Soucy* (1933) 2 Fed. Supp. 481. Here the borrower was given permission to use the car only if someone other than the borrower would drive. The borrower was driving at the time of the accident, and was, therefore, held to be acting without permission. *Fredericksen v. Employers' Liability Assurance Corp., Ltd., of London, England* (1928) C.C.A. 9th, 26 Fed. (2) 76 is one of the leading cases upon the subject. A directed verdict for the insurer was affirmed. *Trotter v. Union Indemnity Co.* (1929) C.C.A. 9th 35 Fed. (2) 104 is decided on the identical facts of the *Odden* case, supra. It would seem that the Federal court is more receptive to the viewpoint of the insurer, since the *Trotter* case reaches the opposite result from that obtained in the Washington court. See also *Columbia Casualty Co. v. Lyle* (1936) C.C.A. 8th, 81 Fed. (2) 281. It should be noted that the Federal cases usually permit directed verdicts rather than making it a jury question.

34. It is not hard to tell what Louisiana will do in future cases if it continues its present course. In *Theriot v. Tassin* (1933) Ct. of Appeals—1st Circuit—146 So. 729 it was clear that the bailee had made a far longer drive than contemplated by the assured and could not have gotten the car back in proper time. It was also clear that an actual conversion, as interpreted by the common law, existed. Merely because the time of bailment had not expired, the court held: "The loan agreement was in full force and effect at that time, and the fact that Tassin could not get the car back to Lake Charles by 11 o'clock approximately stated did not avoid or set aside the permission under which he had the right to use the car at the moment of the accident." in *Zuvich v. Ballay* (1933) Ct. of Appeals—Orleans, 149 So. 281 in a somewhat similar case another such result obtained. In the cases of *Waddell v. Langlois, Waddell v. Istrouma Water Co., Davis v. Same* (1935) Ct. of App.—1st Circuit, 158 So. 665, 672, it appeared that Langlois, employed by the water company, had no permission to use the assured vehicle at night. He drove it to a weiner roast and later had an accident. The court held that he was driving the automobile without permission and against express orders and released the insurer. From the above cases, it seems clear that Louisiana will protect the bailee if he had original permission to use the automobile at the time in question no matter how grossly he violates the bailment—even should he convert the assured automobile. However, even if the car is rightfully in his possession, if he has no permission to drive it at the time in question—then no permission will exist. Likewise, if an express prohibition is made as to a certain use, it is unlikely that this state will refuse to enforce such limitation. The distinction is a close one and it seems highly probable that Louisiana may change its law to accord with the great weight of authority.

23. *Hobbs vs. Cunningham* (1930) 273 Mass. 529, 174 N.E. 181; *Collins v. Northwest Casualty Co.* (1935) 180 Wash. 347, 39 P. (2) 986.

24. *Frankel v. Allied Mutuals Liability Insurance Co., Didophy v. Same* (1934) Mass. 192 N.E. 517.

25. *Collins v. Northwest Casualty Co., supra.* The reasoning of this case is very interesting. Here the policy provides that permission of an adult member of the household would be sufficient. Wallace Collins, the operator of the assured car at the time of the accident, was an adult member of his mother's—the assured's household before her death. She died, bequeathing the assured car to him, naming one McVay as executor. The accident occurred before McVay took office. The court gave a lengthy decision, very literal in the construction of the insurance contract, holding that 1. Wallace was not the owner of the car until after probate and could not be protected as such; 2. Permission could not validly be given by McVay before his legal appointment; 3. Subsequent ratification by McVay after his appointment would not be retroactive; 4. Permission given by the assured terminated automatically at her death; 5. The assured, after death, has no household—therefore, there could be no adult members of a household, and Wallace could not give valid permission to himself.

26. *Johnson v. American Auto Insurance Co.* (1932) 131 Me. 288, 161 A. 496.

27. *Sauriolle v. O'Gorman* (1932) 86 N. H. 39, 163 A. 717. In this case, the court held the bailee was acting outside his authority when he made a deviation of a half-mile. In *Utica Mutual Ins. Co. v. Langevin* (1935) 177 A. 549 the court held that where an employee of the assured was driving a truck with the permission of the employer upon the right course in performing his proper duties that he was covered against liability to a passenger whom he had no authority to convey. The court distinguishes the O'Gorman case as there the employee was acting wholly outside his authority whereas here he was acting in a sense both within and without his authority.

28. *Nicholas v. Independence Indemnity Co.* (1933) 11 N. J. Misc. 344, 165 A. 868; *Lucas et al v. U. S. Fidelity and Guaranty Co.* (1934) N. J. L. 491, 174 A. 712. This seems to have been the original holding of New Jersey. However, a recent case changes the result and throws the holding of New Jersey into those states which accord with the result of the *Dickinson* case. See *Rakowski et al v. Fidelity & Casualty Co. of New York* (1936) 185 A. 473. In that case the chauffeur had permission to have the car at the time in question but was acting without authority as to the particular place and task which he was performing at that time. The court cites with approval the cases under the statutory construction of Massachusetts and disapproves the Pennsylvania rule. Because of the very recent appearance of this case the writer has found

while Minnesota³⁵ and Illinois³⁶ take a very broad view of permission.

In this connection it is usually stated that the case of *Dickinson v. Maryland Casualty Co.*³⁷ is the leading case presenting the minority view. It is true that in that case a rather definite departure from the scope of the permission was made by the borrower and that the assured did not grant permission for or contemplate the particular use made of the car at the time of the accident. However, the assured did intend that the bailee use the automobile at the time in question at or near the place where used, although clearly not for the purpose. The court felt that the deviation made was not one of great consequence stating: "These slight deviations from the route to his home, in a swiftly moving automobile, are too unimportant to have attached to them by construction the import of annulling the protective features of this insurance policy." In another part of its discussion, the court spoke of not allowing any departure to nullify the original permission and it is here that the writer believes that the case has been wrongly understood. From the court's language, it is apparent that the court was stating that it would not permit "any deviation or departure," however slight³⁸ to totally annul protection in every case. The hasty reader has interpreted the above language to mean that no deviation or departure will be permitted to annul such permission. In view of the remaining language of the decision and the court's attitude throughout the case, the writer submits that the *Dickinson* case has been grossly misunderstood and maligned. The writer cannot, however, accord with the logic of the majority as it seems clearly to agree with Minnesota and Louisiana in disregarding the third element necessary to the bailment. The case does not purport to hold more than its language clearly indicates.

Tennessee gets into quite a muddle over this question. The result reached seems clear but the logic is atrocious. In the *Stovall* case³⁹ it had held that where a salesman, during a convention, took his car and drove outside his territory without express permission to Sardis, Miss., to see his fiancée, the original permission to use the automobile on company business extended over to cover this situation. In sweeping terms

the court stated: "If, however, the automobile covered by the policy is delivered to another for use⁴⁰ with the permission of the owner or insured, his subsequent use⁴⁰ of it is with the permission of the assured, within the meaning of the policy, regardless of whether the automobile is driven to a place or for a purpose not within the contemplation of the assured when he parted with possession."⁴¹ The court emphasizes the fact that the assured intended to protect any person injured by the operation of the car and pointed out that it had the right to construe the policy most strongly against the insurer.

It is elementary to the rawest beginner in law that a man can use a car without manipulating it personally—that he can drive through a servant or agent. In view of the expressed desire of the court to make original assent the only requirement of liability in permitting a recovery to third parties wherever possible, and its intention to construe the policy against the insurer we might expect a similar result to obtain in other cases. In a later case,⁴² however, the only difference in the factual set-up was that Wilkes, the salesman, was permitting one Thrice to drive and was himself riding in the rear seat. The policy in this case protected persons "while riding in or legally operating" with the assured's permission. Here the plaintiff was not proceeding against Thrice but against the salesman, Wilkes. The court attempted to make a distinction in the terms of the two policies stating that in the *Stovall* case it had read "with the permission" whereas here it reads "with the consent" thereby implying a more affirmative meaning. Recognizing the futility of this argument, the court arbitrarily stated that the salesman went beyond his authority when he delegated the use of the car to another. The outcome is that the salesman was 1. using the car within the language of the *Stovall* case 2. Riding in the car within the terms of the policy. 3. Had, as a practical matter, at least as much permission as in the *Stovall* case. The result is, of course, to protect such bailee until he turns over control of the automobile to another. The writer far prefers the logic of the *Jones* case to that of the *Stovall*. Its language is forceful, logical, and well-expressed. If this case stood alone it would be a notable contribution to law. It, in itself, is unobjectionable. The objection is to the fact that the court would not make a clean cut reversal of the only case decided by any Supreme Court upon this subject, in the absence of statute, which is completely astray. The logic of the *Jones* case completely overrules all set forth in the *Stovall* case, yet that decision hangs like an albatross around the neck of the court until it shall gain enough courage to shake it off. Until such reversal is squarely made, we must take the literal results as representing the law of Tennessee.

The question has often been asked as in the *Jones* case as to whether a borrower could extend coverage to a third person by permitting him to operate the assured vehicle. If such power were expressly or impliedly given him, it is clear that he could do so.⁴³ In

35. *Peterson v. Maloney* (1930) 181 Minn. 437, 232 N.W. 790. Here the borrower was driving to the place he had stated he desired to go, at a time when he had permission to use the car. The Minnesota court holds, as did Louisiana, that the mental attitude of the borrower would not affect the validity of the permission granted. It should be observed that here the borrower had misrepresented the purposes for which he desired the automobile. Three things must usually exist when original permission is granted in order that such consent be effective at the time of the accident. The borrower must be driving at the time, place, and for purposes contemplated by the bailment. The third requirement Minnesota disregards.

36. *Karton v. New Amsterdam Casualty Co.* (1935) 280 Ill. App. 201. Here a police officer was granted permission by the assured to drive home in the assured car, a distance of four blocks. The next morning he was killed while driving 70 miles an hour around Chicago in an intoxicated state, shooting his revolver out of the window. Judge O'Connor stated "position of plaintiff seems to be that since Weiss was permitted to take the automobile in the 'first instance' there was liability * * * We think the contention of plaintiff must be sustained." This is only an Appellate decision and in view of the strong and well reasoned case of *Bohumil Soukop v. Anton Halmel*, *ibid*, the chances are about ten to one that this case would have been reversed upon appeal to the Supreme Court of Illinois.

37. (1924) 101 Conn. 369, 125 A. 866. This decision was reached by a three to two vote.

38. *Italics author's.*

39. *Stovall v. New York Indemnity Co.* (1928) 157 Tenn. 301, 8 S.W. (2) 473.

40. *Italics author's.*

41. *Stovall* case, page 477.

42. *American Auto Ins. Co. v. Jones* (1932) 163 Tenn. 605, 45 S.W. (2) 52. The case of *Hunter v. Western & Southern Indemnity Company et al.* (Nov. 30, 1935, Certiorari denied by Supreme Court March 7, 1936) 92 S.W. (2d) 878, follows in direct line with the *Jones* case and makes clear the position of the court. The court still fails to overrule the *Stovall* case.

43. *Boyer v. Massachusetts Bonding and Indemnity Co.* (1931) 277 Mass. 359, 178 N.E. 523; *Odden v. Union Indemnity Co.* *supra*;

the absence of such authority and in the absence of statute, such cannot be done.⁴⁴ This, of course, applies chiefly to individuals as corporations must act through agents who can delegate their own privilege of operating vehicles. It seems to be held, further, except in states where statutes on ownership liability are controlling, that by lending the automobile in an unauthorized manner, the borrower relinquishes his own protection.⁴⁵

In a much-discussed New Jersey case⁴⁶ the attorneys overlooked the possibility of dealing with this question. It was there held that the son, being a minor, could not give valid authority under the adult permission clause to a third person to use the car. The question was not raised as to whether he could do this from his authority as a bailee. While there might have been some basis for a finding of implied permission, the great likelihood is that the court would have followed the majority decisions in this regard.

The decisions reached by the majority are undoubtedly the sounder law. In arriving at this result the courts have recognized that the unauthorized lending of a bailed automobile constitutes a conversion. Conversion and permission are direct antonyms and cannot exist simultaneously. Since permission would not exist, there would be no reason to impose liability upon the insurer in those circumstances.

We have been careful, up to this point, to omit discussion almost entirely of states where there is a statutory requirement making the owner liable for the negligent driving of his automobile with his permission. A statute of this type is almost identical with the omnibus clause and should ordinarily be given the same interpretation. There are peculiarities in wording and in phrasing of some such statutes which have led to some different results. The chief factor, however, seems to be the attitude of the courts that by passing such statutes it was the intention of the legislatures to provide protection for innocent third parties in all situations—and because of this, the courts stretch every legal interpretation of the word "permission" in an attempt to cover all cases. At times they revert to a stricter interpretation of permission and inconsistent results have obtained. Each of the states important to a consideration of this particular problem of permission is treated herein.

Section 402 of the California Vehicle Code (1935) reads: "Every owner of a motor vehicle is liable and responsible for the death of or injury to persons or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise by any person using or operating the same with the permission, express or implied, of such owner."⁴⁷ The statute limits recovery for any one injury to \$5,000.00, etc., and requires recovery against the negligent operator first, if possible. The statute has

been interpreted in a number of cases⁴⁸ but none has squarely represented the issue of defining permission. A recent case has passed upon the question of whether or not a bailee for hire could make the owner liable for the negligent driving of a third person to whom he lends the car. The court imposed liability, stating: "The Code section makes the owner liable for the negligence of any person using or operating his automobile with his implied or express permission. The word 'operate' meaning 'to direct or superintend' is sufficient to hold the owner liable for the negligence of a person to whom his permittee has temporarily entrusted the automobile * * * does not require that the particular driver be known, and his driving assented to by the owner."⁴⁹ This rule has been held to apply in the cases of gratuitous bailment as well.⁵⁰ It is hardly likely, therefore, in view of the strength of the language that the court would impose any limit upon the liability of an owner, where it does not even require that the particular driver be known.

Florida holds that the relation of respondeat superior applies where the owner grants an original permission. "In view of our regulatory laws, an automobile owner will not be permitted to refute the relationship which is implied in law where it appears that such auto owner, has permitted, with his knowledge and consent," etc.⁵¹ It then reaches the peculiar result of not applying the same rule to bailees for hire.⁵²

Iowa's statute reads: "In all cases where damage is done by any car driven by any person under 15 years of age and in all cases where damage is done by car, driven by consent of the owner, by reason of the negligence of the driver, the owner of the car shall be liable for such damage."⁵³ This act is certainly as broad as that of California but the decisions construing it are sounder. It is held that a bailee must be operating at the time and place and under the circumstances

(Continued on page 646)

48. *Sutton v. Tanger, Almstead v. Same* (1931) 115 Cal. App. 267, 1 P. (2) 521; *Barnett v. Harman et al* (1931) 115 Cal. App. 283, 1 P. (2) 458; *Garrison et al v. Williams et al, Corkery v. Same* (1933) 128 Cal. App. 598, 17 P. (2) 1072; *Kerrison v. Unger* (1934) 135 Cal. App. 607, 27 P. (2) 927; *Manica v. Smith et al* (1934) 138 Cal. App. 695, 33 P. (2) 418. An interesting problem in connection with the previous discussion on power to grant permission is found in *O'Neill v. Williams et al* (1932) 127 Cal. App. 385, 15 P. (2) 879 where the defendant's counsel made the argument that here the assured's husband, who was operating the car at the time of the accident could have used such vehicle without permission by virtue of his relationship. If the right were a legal right, it would not be a "permissive use" as set out by statute. The court pointed out that the husband's common law right had been changed by the Married Women's Acts. Here the automobile belonged to the wife as her separate property and the husband could not use it without permission.

49. *Sutton v. Tanger, Almstead v. Same, supra*.

50. See *Haggard v. Frick et al* (1935) 44 P. (2) 447 where the owner even requested his son not to permit anyone else to drive. Also *Pohle v. Bolinas Beach Realty Co.* (1933) 130 Cal. App. 704, 20 P. (2) 730; *Hughes v. Quackenbush* (1934) 1 Cal. App. (2) 349, 37 P. (2) 99.

51. *Engleman v. Traeger* (1931) 102 Fla. 756, 136 So. 527. See Ch. 7275, Acts 1917 and the case of *Eppinger and Russell Co. v. Trembley* (1925) 90 Fla. 145, 106 So. 879; *Herr v. Butler* (1931) 101 Fla. 1125, 132 So. 815; *Dowling v. Nicholson* (1931) 101 Fla. 672, 135 So. 288; *Greene v. Miller* (1931) 102 Fla. 767, 136 So. 532; *Rice et al v. Phillips* (1934) 115 Fla. 409, 155 So. 723. Florida's anxiety to reach this result, however, may be somewhat explained by the fact that it follows the dangerous instrumentality doctrine. See *Southern Cotton Oil Co. v. Anderson* (1920) 80 Fla. 441, 86 So. 629.

52. *White v. Holmes* (1925) 89 Fla. 202, 103 So. 623; *Williams et al v. Younghusband et al* (1932) C.C.A. 5th 57 Fed. (2) 139. See also *Engleman v. Traeger, supra*.

53. See Section 5026 Code (1927) Orig. Acts of 38th Gen. Assembly (1919) Ch. 275.

44. *Indemnity Ins. Co. v. Sanders, ibid*; *American Auto Ins. Co. v. Jones, ibid*; *Indemnity Ins. Co. v. Jordan* (1932) 158 Va. 834, 164 S.E. 539; *Trotter v. Union Indemnity Co., ibid*; *Columbia Casualty Co. v. Lyle, ibid*; and the Massachusetts cases decided in the following pages, where a similar result was reached despite the statute.

45. *Indemnity Ins. Co. v. Sanders, ibid*, which while it is not directly in point, at least appears to make such an implication; *American Auto Ins. Co. v. Jones, ibid*; *Trotter v. Union Indemnity Co., ibid*.

46. *Lucas et al v. U. S. Fidelity and Guaranty Co., ibid*.

47. This was formerly found in Sec. 1714½ of the Civil Code.

INCOME TAXES OF STATE LIQUOR MONOPOLIES

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A GENERATION ago the Supreme Court held in the broadest terms that the liquor business then conducted by the State of South Carolina was not exempt from federal excise taxation. *South Carolina v. United States*, 199 U. S. 437 (1905). This conclusion was reaffirmed in sweeping language quite recently when Ohio sought what was in effect a reconsideration of the earlier decision. *Ohio v. Helvering*, 292 U. S. 360 (1934). And the questions have been further reexamined in *Pennsylvania ex rel. Margiotti v. Kyle*, 79 F. (2d) 520 (C.C.A. 3d, 1935), certiorari denied, 297 U. S. (1936). With these cases on the books, it might seem that the question of the taxability of state liquor monopolies was thoroughly settled. For this reason there is more than usual interest and importance in a recent series of Treasury rulings which eventually reach the conclusion that these authorities are not applicable to federal income taxes. In order to outline the question more completely, and incidentally to set up a target for these observations, it may be well to attempt first a summary of these decisions of the Treasury on the question under discussion.

I. THE RULINGS OF THE TREASURY

In the summer of 1934 the Bureau of Internal Revenue was called upon to rule whether the profits realized by the Oregon Liquor Control Commission were subject to federal income tax. The question was regarded as not different from that presented in the cases of South Carolina and Ohio; and, after quoting excerpts from the opinions of the Supreme Court in the cases of those two states, the Treasury ruled "that profits realized from the operation of liquor stores and similar activities by the State of Oregon through the Oregon Liquor Control Commission are derived from proprietary, as distinguished from essential governmental activities. Accordingly, such profits are subject to federal income tax." I. T. 2797, XIII-2 Cumulative Bulletin 74. This conclusion, however, seems to have overlooked something more subtle, for less than three months later it was found to be erroneous. The revised conclusion was expressed in an opinion of the Assistant General Counsel of the Bureau of Internal Revenue. G.C.M. 13745, XIII-2 Cumulative Bulletin 76. In this opinion the decisions in *South Carolina v. United States* and in *Ohio v. Helvering* were, of course, recognized, but it was held that they related only to excise taxes and "that the right of the Federal Government to impose such an excise tax may not properly be extended to include a tax on the profits derived by a State from such activities."

The only reason given in support of this conclusion is stated in the following language:

"It is now shown that in accordance with statutory provisions a large portion of the profits accruing to the State of Oregon from the operation of the liquor business and similar activities is used by the State in carrying out certain functions, including direct relief of the indigent and unemployment relief, which are essentially governmental. If the Federal Government imposed a tax on such profits, it would in effect result in the imposition of a tax upon the property of the State and would burden

the State in the exercise of its governmental functions."

On this basis it was then held that the profits realized by the Oregon Liquor Control Commission were not subject to federal income tax and that the earlier decision should be modified accordingly. This modification was made concurrently. I.T. 2820, XIII-2 Cumulative Bulletin 77.

This decision, which could mean no less than that a Federal tax on the income of state liquor monopolies was unconstitutional, was, to say the least, surprising. At any rate, it was shortly reconsidered in another opinion, this time by the General Counsel of the Treasury. G.C.M. 14407, XIV-1 Cumulative Bulletin 103. The question at issue this time was the taxability of the profits realized by the State of Montana from the operation of its state liquor stores. The issue was not notably different from that presented in the previous opinions involving Oregon, and it is not surprising that the same conclusion was reached. But the ground of the decision was fortunately changed. The argument of unconstitutionality was eliminated with these words: "In order to clear up any doubts as to the meaning of G.C.M. 13745, it should be pointed out that that opinion is not to be considered as authority for any ruling other than that the income under consideration is not taxable by the Federal Government under existing legislation. It may not be taken as a determination of the constitutional question involved."

The new opinion was rested chiefly on the ground of long-continued practical construction. This argument seems to fade somewhat, however, when it is remembered that for a period of fifteen years of this long-continued practice, from 1917 to 1933 during the periods of war-time and National prohibition, there were no state liquor monopolies.

A few weeks later this final conclusion of the Treasury was reiterated in a decision that "profits derived by the State of Virginia from the operation of liquor stores by the State are not subject to Federal income tax"; the compensation of the State's employees, however, was held not to benefit from the same immunity. I.T. 2886, XIV-1 Cumulative Bulletin 103.

Perhaps a first observation on these rulings might be that it seems extremely fortunate that the decision on constitutionality was not allowed to stand. There would seem to be grave doubt whether an administrative ruling should be made against the constitutionality of any statute, especially under circumstances such as those presented here. Of course, administrative authorities have to decide doubtful questions. When the question is a constitutional one, however, it would seem that an administrative ruling should resolve all doubts in favor of the validity of the statute.

An administrative ruling can be very damaging when a case comes before a court, as all who have presented tax cases are well aware. Attention need only be directed to *Evans v. Gore*, 253 U. S. 245 (1920). That case involved the constitutionality of a tax on the salaries of federal judges. The Court held that the salaries could not be taxed. There would seem to be much to be said on the other side of the question, and courts in other countries, where the same question has

been raised, have uniformly reached the opposite conclusion. When the opinion in *Evans v. Gore* is examined, we find that in large part it goes back to certain administrative rulings made shortly after the Civil War, in which it was held that the judges' salaries could not constitutionally be taxed. See 245 U. S. at 258. In a similar way, G.C.M. 13745 might very likely have been a serious obstacle in the path of the Government at some day in the future when the constitutional question may be presented in court.

The questions of constitutionality and of construction considered in the series of Treasury rulings that form the theme of this discussion are of more than usual interest. It does not seem entirely clear that the rulings themselves foreclose all further examination of the question.

II. THE QUESTION OF CONSTITUTIONALITY

With *South Carolina v. United States* and *Ohio v. Helvering* on the books, there would seem to be no need to present an extensive citation of authorities as to the constitutionality of such a tax. The only reason given in General Counsel's Memorandum 13745 does not seem very convincing. As has been indicated above, this opinion apparently went on the ground that the proceeds of the liquor business then under consideration were used for "carrying out certain functions, including direct relief of the indigent and unemployment relief, which are essentially governmental." But there has been no indication in the decisions of the Supreme Court that the purpose to which the profits of a liquor monopoly are devoted is material. The question is rather, whence are these profits derived? It is a question of source, not of destination. In *South Carolina v. United States*, itself, the net proceeds were devoted to governmental functions; the excise tax there involved reduced those net proceeds just as surely as would an income tax, and thereby decreased the amount available to the State of South Carolina for its governmental purposes. A tax on the income from the liquor business, it would seem obvious, is no more and no less a tax on the property of the state than is an excise tax for the privilege of using that property in carrying on the liquor business. The profits from the business do not become part of the "general property" of the state until that business has paid the taxes which may properly be imposed upon it. Moreover, to draw any conclusion from the argument that the income tax is levied upon the property of the state (even if there were any basis for saying that that would be fatal) is to beg the question. It cannot be determined that the property is entitled to the immunity of the state until the question whether it is subject to a federal income tax has been decided; and that, of course, is the very question at issue. Cf. *Perkins v. United States*, 163 U. S. 625 (1896), and *Snyder v. Bettman*, 190 U. S. 249 (1903), where the argument that a tax was bad because it was payable out of property which would otherwise go to the sovereign was rejected.

There is no decision of the courts which gives any basis for the conclusion that income taxes are to be treated in a case of this sort differently from any other taxes. The rule that a proprietary activity carried on by a state is subject to federal taxation has been held applicable to capital stock taxes. *State of North Dakota v. Olson*, 33 F. (2d) 848 (C.C.A. 8th, 1929), appeal dismissed, 280 U. S. 528 (1929). And the rule of taxability has been similarly applied in the case of income taxes of employees of so-called "proprietary" activities. *Helvering v. Powers*, 293 U. S. 214 (1934).

Indeed, the decision in *Helvering v. Powers* would seem to remove any possible doubt as to the constitutional question. In that case, the Supreme Court has decided that the salaries paid to the Trustees of the Boston Elevated Railroad were subject to federal income taxation, although the Trustees were appointed by the Governor and pursuant to a statute under which the Railroad was operated by the State. In reaching this result the Court said:

"The principle of immunity thus has inherent limitations. . . .

"And one of these limitations is that the state cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend."

This reasoning is as applicable to income taxation as to other kinds of taxes. The state cannot withdraw "sources of revenue" in the field of income taxation any more than it can withdraw the sources of excise taxes from federal power.

III. THE QUESTION OF CONSTRUCTION

The question upon which the Treasury rulings ultimately turned is that of the construction of the revenue acts. Assuming federal power, has Congress undertaken to impose any tax on the incomes derived by states from their operations in the liquor business? On this question, *Ohio v. Helvering* would seem sufficient to give pause. If the liquor excise taxes are applicable to states, it seems far from easy to conclude that the income tax act was not likewise intended to apply to states. In this connection, attention may be directed to the decision in *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84 (1934), where the Supreme Court held that the United States fell within the phrase "residents, corporate or otherwise," in an income-taxing statute. And, reference may again be made to *State of North Dakota v. Olson*, 33 F. (2d) 848 (C.C.A. 8th, 1929), appeal dismissed, 280 U. S. 528 (1929), where the capital stock tax imposed in terms on "corporations" (see § 1000 of the Revenue Act of 1921) was applied, and held applicable, to a state. There seems, therefore, to be ample authority for holding that the income of a state is included within the general income tax on corporations so far as the income is taxable under the Constitution.

But apart from such general arguments, there is a specific provision of the revenue acts which seems almost conclusive on the question of construction. This is § 116(d) of the Revenue Act of 1934, which provides that certain items "shall not be included in gross income and shall be exempt from taxation under this title," including:

"(d) *Income of States, Municipalities, etc.*—Income derived from any public utility or the exercise of any essential governmental function and accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory or income accruing to the government of any possession of the United States, or any political subdivision thereof."

This provision goes back to the very beginning of our income tax laws. It was contained in § 11(G)(a) of the Tariff Act of 1913, and in § 11(b) of the Revenue Act of 1916. It was recognized in Article 93 of Regulations 33, under the 1916 Act, and the latest provision of the Regulations is Article 116-2 of Regulations 86. If the statute is not to be construed to apply to the income of states derived from *proprietary* functions, then this specific language in each of the revenue acts has

been wholly meaningless and useless. If Congress did not intend to tax state income in any event, it would have said so, instead of including such a provision as § 116(d). Since § 116(d), by its terms, operates to exempt only income "derived from any public utility or from the exercise of any essential governmental function," it would seem to be a necessary inference that Congress intended to tax any income derived from a function which was *not* essentially governmental (except income derived from a public utility). This provision was originally in the section of the Act relating to corporations, and it would therefore seem to follow that Congress intended to tax the states as corporations. The correctness of this conclusion has been assumed in several Treasury rulings. See O. 895, 1 C. B. 91; O. D. 250, 1 C. B. 92; I. T. 2405 VII-1 C. B. 72. Cf. T. D. 4303, X-1 C. B. 181.

Although this conclusion would seem to be required from the words of the statute itself, the construction seems more clearly correct when the legislative history of this particular provision is examined. As has been pointed out, the provision which is now § 116(d) of the Revenue Act of 1934 finds its origin in § II(G) (a) of the Tariff Act of 1913. The Tariff Bill of 1913, as passed by the House, did not contain any provision relating to the income derived by states or their subdivisions, from any source. The bill as passed by the House is set out at pp. 1409-1430 of Vol. 50 (Part 2) of the Congressional Record (Sixty-third Congress, 1st Session). The income tax provisions appear on pp. 1422-1424. When the bill went to the Senate, it was referred to the Committee on Finance, and that Committee amended the House bill by inserting at the end of the first paragraph in § II(G) the following:

"There shall not be taxed under this section any income from whatever source derived accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State, Territory, or the District of Columbia, nor any income accruing to the government of the Philippine Islands or Porto Rico, or of any political subdivisions of the Philippine Islands or Porto Rico. (Italics added.)"

In connection with this amendment the Senate Committee made the following report (see Senate Report No. 80, Sixty-third Congress, 1st Session, p. 26):

"Immediately following the foregoing amendment a further provision is inserted to meet the cases of States, cities, towns, and other political subdivisions which are in receipt of income from sources other than that of taxation and about which question was raised that such incomes might be held subject to the tax. One State enjoys a revenue from the gross earnings of a railway company to which a land grant was made by the State years ago. A city under its contracts with the street railway companies is entitled to a certain per cent of the net earnings per annum. While it was regarded improbable under the provisions of the bill that these revenues to States and municipalities would be construed as taxable income, to foreclose all doubt the amendment is inserted expressly exempting such revenues from the operation of the act."

This amendment proposed by the Senate Committee on Finance was adopted by the Senate. See 50 Congressional Record (Part 4) 3867.

The Senate also adopted a further amendment, which was offered from the floor on behalf of the Committee, relating to the exemption of the income of public utilities where the utility was operated under a contract with a State or subdivision so that the tax would impose a burden on the State or subdivision. See 50 Congressional Record (Part 5) 4380.

The House disagreed with the Senate amendments and the bill was referred to a conference committee. The first of the amendments referred to was numbered 564 and the second, 565. The conferees recommended that the Senate amendment numbered 564 be accepted, but with a further amendment making the provision read as it was finally enacted. See House Report No. 86, Sixty-third Congress, 1st Session, p. 15. This provision embodied both of the Senate amendments so that the Senate receded with respect to the amendment numbered 565. In connection with this recommendation, the managers on the part of the House made the following report (House Report No. 86, Sixty-third Congress, 1st Session, p. 26):

"The House provision which only exempted profits accruing to States and their political subdivisions from the operation of their essential governmental agencies is modified to the extent that all such profits accruing from public utilities shall also be exempt."

Although this paragraph of the Report refers to "The House provision," there does not seem to have been any express provision on the subject in the bill as enacted by the House—as has already been pointed out. The Report therefore seems to indicate that the House managers contemplated that all income derived by States and their subdivisions would be taxable under the general provisions of the bill, except so far as it was derived from an essential governmental function.

The bill as passed by the Senate completely exempted all state income from taxation regardless of its source; but this provision was plainly not acceptable to the House, and the House managers insisted, and were successful in their insistence, that the exemption be limited to income derived from essential governmental functions and from public utilities. The legislative history, therefore, seems to show quite clearly that the responsible members of Congress did consider the question with which we are concerned and that they expressly contemplated that all state income would be taxed unless it fell within the two exempt classes. If this had not been their intention, the Senate amendment would have stood.

The provision as finally enacted in the Tariff Act of 1913 has been included without change in each of the succeeding revenue acts. It seems to be fairly clear, therefore, that the revenue acts ought to be construed to impose a tax upon any income of a state not derived from the exercise of an essential governmental function, or from the operation of a public utility. General Counsel's Memorandum 13745, therefore, cannot stand on grounds of construction any more than it can rest on constitutionality. And the correctness of General Counsel's Memorandum 14407, which puts the question solely on grounds of construction, seems open to grave doubts. The ground upon which it was rested, namely that of practical construction, seems neither well taken nor sufficient to meet the clear lesson to be derived from the legislative history.

Although the gods speak with authority, and in such a way that none can deny, mortals may with propriety ponder on their pronouncements. Very likely small harm results from the Treasury's position that state liquor profits are free from Federal income tax. The States need the money as badly as does Washington, if that is possible. But the questions presented are interesting and the conclusion ultimately reached by the tortuous series of Treasury rulings seems at least open to question. It might be well if Congress would specifically declare its will one way or the other.

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MISAPPREHENSIONS AS TO THE JUDICIAL FUNCTION

In its report the Standing Committee on Jurisprudence and Law Reform enumerates and condemns a number of proposals made in the last Congress to limit the power of the Federal Courts to deal with constitutional questions.

Some of these show the old familiar faces, while others present novel and fantastic forms. For instance, there is the provision in a number of bills to amend the substantive law, forbidding Federal Judges to declare "this Act" of Congress unconstitutional and declaring that the judge who does so violates the requirement of "good behavior," and thereby ipso facto vacates his office.

No hearing, the Committee points out, was held on any of these measures and at no time during the last session did there seem likelihood that any of them would be passed. But the Committee finds all these varied proposals significant in that they represent a popular tendency due largely to a misunderstanding by many people of the part the Courts play in our system of government. The Committee holds that the organized legal profession has the duty of removing such misunderstandings by all means within its power.

"This is a situation which the Association should not hesitate to face," it declares. "By combating this tendency, it can render its greatest service. It is non-partisan and represents a typical cross-section of the nation, and is the organization best equipped to render such service."

The Committee has very properly stressed one of the most important functions of the Bar

—the defense of the necessary powers of the Courts. It is a truism that of the three Branches in our system of government the Judicial is the one most poorly equipped with means for its own defense. Its sole support is an enlightened public opinion, and to help the public form a just estimate of the character and importance of the judicial function in a free country is preeminently the duty of the Bar. By virtue of their training and experience, lawyers are specially fitted to discharge this public responsibility.

One special kind of misunderstanding with which they are called upon to deal—and one from which some lawyers even do not appear to be exempt—concerns the essential nature of the judicial function. Every now and then one hears the charge that the Supreme Court is arrogating to itself the power to veto legislation. Doubtless many people have been led to believe that the Court is setting itself up as a check on what it regards as unwise steps by Congress and is going out of its way to interfere with the processes and products of legislation.

The public needs to be fully advised that nothing could be further from the facts; that the courts are concerned with the settlement of private controversies which come before them in the ordinary course of their business; that they are not in the least interested in legislation except as some citizen comes before them to urge that his rights have been infringed by some act of Congress or a State Legislature. As Mr. Justice Brandeis said in a very recent case, "We have no occasion to consider the constitutional question, because it appears that the plaintiff is without standing to present it. One who would strike down a State statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him."

The public should be further advised that, so far are the courts from attempting to exercise a veto power, that they decline to rule on the constitutionality of a legislative act if there is any other ground on which the case may be decided; and that even in passing on the constitutionality of such acts, they proceed on the assumption that they are valid and only decline to apply them when their unconstitutionality is, in their opinion, clear beyond all question.

Mr. Justice Roberts, in *United States vs. Butler et al.* put the nature of the judicial function very clearly when he said:

"There should be no misunderstanding as to the function of this court in such a case. It

is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."

The report of the Committee on Jurisprudence and Law Reform makes the following pertinent observation as to the familiar function of the lower Federal Courts in cases in which the validity of Congressional Acts is properly challenged:

"The arguments against depriving the lower Federal Courts of the power to declare an Act of Congress unconstitutional are based upon considerations of practical justice. It is a long accepted concept of our jurisprudence that laws are to be construed and their validity determined in ordinary suits between private litigants. Granted the principle that an unconstitutional act is of no force or effect, it is difficult to understand why the humblest suitor should be repulsed from the ordinary court or should under a void legislative mandate be deprived of property or liberty, or suffer an irreparable wrong. Moreover, this power has not been abused. Whenever constitutional questions are presented, the controversy, if possible, is determined upon other considerations and always all doubts are resolved in favor of constitutionality."

If the American Bar Association in the campaign which the Committee recommends can make it clear to the public that the Court is not only not challenging the will of the people as expressed in Congressional Acts but is merely exerting its power for the protection of the rights of the individual litigants, in private cases properly presented, it will cut the ground

from beneath such proposals as those which it properly condemns in its report.

THE "CRITICAL PERIOD" IN ASSOCIATION HISTORY

It seems a fair inference, from the lack of organized opposition or even of noticeable protest, that the plan for reorganization of the American Bar prepared by the Coordination Committee and the General Council of the Association will be approved at the Boston meeting. Certainly it will be very surprising if anything occurs at this late date to prevent its adoption.

Such being the case, many will no doubt assume that what may be called the "critical period" in the movement for a more representative organization of the Bar has now ended. Perhaps it has. Certainly John Fiske, in his well known work, held that the critical period in United States history ended with the adoption of the Constitution; that during the time between the signing of the Treaty of Peace and the adoption of the Constitution itself the vital question of whether there was to be any nation at all in a real sense was settled.

The analogy may seem a little strained, but it is at least suggestive. The Association has gone through a period in which the question of whether the Bar was to remain largely a scattered group of independent organizations, without even a semblance of organic connection, was the dominant one, and at the end of it a plan has emerged which promises a real union of professional forces. Without the successful completion of the work of this period, of course there could be no further progress in the direction of a more representative organization. In that sense, a critical period has ended—but whether it may be called "the" critical period remains to be seen.

Certainly what has been done is only the beginning of the realization of the ideal which has inspired the movement thus far. The framework has been provided, but the extent to which it will be utilized depends on the enthusiasm and support of the Bar. It may well become a living, vital thing, or it may remain merely a beautiful blue-print, unless there is a definite resolution to make the plan work and a continuation of the efforts which have been crowned with such success up to the present time. From this standpoint, the next few years may also be regarded as a critical period during which the fate of the movement may be definitely determined.

REVIEW OF RECENT SUPREME COURT DECISIONS

Exclusion of Proof of Possible Use of Land, Even Though Such Use May Be Made Only in Connection with Other Land, Affects Substantial Rights of Owner in Condemnation Case, and Held Ground for Reversal Where Record Does Not Affirmatively Show Error Was Not Prejudicial—United States an Indispensable Party to Suit to Determine Rights of State as to Apportionment of Water in Navigable Stream, and Cannot Be Sued without Its Consent—Common Stock, Given as Dividends on Preferred Stock in Lieu of Cash Accrued, Not Taxable as Capital Gain—Plaintiff Must Show Injury by Alleged Unconstitutional Provision of Statute before He Can Challenge Constitutionality of Act—Service Rates under Packers and Stockyards Act—Regulation of Rates Fixed by Secretary of Agriculture under Same, etc.

By EDGAR BRONSON TOLMAN*

Eminent Domain—Evidence of Value—Harmless Error Statute

In condemnation cases the most profitable use to which land can probably be put in the reasonably near future may be shown as bearing on market value; and the fact that such use can be made only in connection with other lands does not exclude it from consideration, if such possibility reasonably affects market value.

Erroneous exclusion of proof of such possible use relates to the substantial rights of the landowner, and is ground for reversal, where the record as a whole does not affirmatively show that the error was not prejudicial.

McCandless et al. v. United States, 80 Adv. Op. 797; 56 Sup. Ct. Rep. 764.

In this opinion, the Court considered the propriety of a ruling as to the admissibility of evidence, and the question whether, if the evidence was admissible, its rejection was prejudicial.

The questions arose in a suit brought by the government for the condemnation of a certain land on the Island of Oahu, the suit having been brought in the District Court for the Territory of Hawaii. For 4,080 acres, a jury fixed the value of the land at \$206,503.51, and the value of the improvements at \$14,000. The trial court rejected offers of the petitioners to prove that there were sources of water supply adapted to use for irrigating the land, so that it could be used for the purpose of raising sugar cane. Various other offers were made relevant to the use of the land for such purpose. These offers were rejected, on the ground that the possibility of bringing water from outside sources was too remote and speculative, and the trial court instructed the jury to disregard the possibility of bringing water to the land from other land, except the land to be condemned, and an adjoining tract of 284 acres owned by the petitioners.

The Circuit Court of Appeals, though concluding that these rulings were erroneous, affirmed the judgment on the ground that they were harmless error. On certiorari this was reversed by the Supreme Court, in an opinion by MR. JUSTICE SUTHERLAND.

As to the applicable rule of evidence in condemnation cases, he said:

"The rule is well settled that, in condemnation cases, the most profitable use to which the land can probably be

put in the reasonably near future may be shown and considered as bearing upon the market value; and the fact that such use can be made only in connection with other lands does not necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect market value. . .

"That the greater part of the land here sought to be condemned was adapted to the successful growth of sugar cane if provided with sufficient water for irrigation is not controverted. Proof that a supply of water was available and might be brought to the land at an expense consistent with its profitable use was, therefore, relevant and material. And this the evidence offered tended to establish. The ruling of the trial court rejecting the offers, and its instruction to the jury to disregard the possibility of bringing water from lands other than the land sought to be condemned and the 284-acre tract adjoining were erroneous. This is well pointed out by the court below, and we see no occasion to enlarge upon its opinion."

In regard to the question whether the rulings were harmless error, the government relied on the "Harmless Error" provisions of the Judicial Code, embodied in § 269. It provides that:

"On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

In applying this statute, the circuit court had concluded that the offers of proof were not sufficiently specific. But the Supreme Court was of the opinion that in view of the rulings of the trial court, the petitioners were not bound to make further offers of proof. As to the proper application of the provisions, MR. JUSTICE SUTHERLAND said:

"In this situation, § 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. . .

"This the record does not disclose. In an eminent-domain proceeding, the vital issue—and generally the only issue—is that of just compensation. The proof here offered

*Assisted by JAMES L. HOMIRE.

necessarily related to the value of the land when used for a purpose to which it probably could be put within the rule laid down by the *Olson* case, [292 U. S. 246]. To exclude from the consideration of the jury evidence of this elementary character could not be otherwise than prejudicial."

The case was argued by Messrs. Julius Russell Cades and Urban Earl Wild for the petitioners, and by Mr. Assistant Attorney General Blair for the government.

Water Rights—Apportionment of—Governmental Immunity from Suit Without Express Consent

A suit by a state cannot be maintained against the United States without the latter's consent.

Since the United States is an indispensable party to a suit brought to determine the rights of the complainant state in respect of the apportionment of unappropriated water in a navigable river, over which the United States has exercised its control by the construction and projected construction of dams, the suit will be dismissed where the United States is not a party to the suit and has not consented to be sued.

Arizona v. California et al., 80 Adv. Op. 877; 56 Sup. Ct. Rep. 848.

This case arose on the petition of the State of Arizona, under the Supreme Court's original jurisdiction, for leave to file a bill of complaint against several other states as defendants, to determine certain claims as to the rights of the states in respect of the apportionment of the water of the Colorado River.

The bill sought the following relief: (1) fixing of the amount of Arizona's equitable share of the water and quieting title of Arizona against adverse claims of the defendant states; (2) that California be barred from having or claiming any right to divert more than an equitable share of the water, not to exceed the limitation imposed by the Boulder Canyon Project Act, and an Act of the California legislature of 1929; (3) that it be decreed that diversion and use by any defendant of any part of the equitable share decreed to Arizona pending its diversion and use shall not constitute a prior appropriation or confer a right superior to Arizona's; and (4) that any right of the Republic of Mexico to an equitable share in any increased flow made available by the works being constructed by or for California, shall be supplied from California's equitable share of the water.

The proposed bill is thus summarized in the opinion of Mr. JUSTICE STONE:

"The proposed bill thus, in substance, seeks a judicial apportionment among the states in the Colorado River basin of the unappropriated water of the river, with the limitation that the share of California shall not exceed the amount to which she is limited by the Boulder Canyon Project Act and by her statute, and with the proviso that any increase in the flow of water to which the Republic of Mexico may be entitled shall be supplied from the amount apportioned to California. Our consideration of the case is restricted to an examination of the facts alleged in the proposed bill of complaint and of those of which we may take judicial notice."

The defendants opposed the filing of the bill on the ground that it fails to present any justiciable controversy, and that the United States is an indispensable party, which has not been named defendant and has not consented to be sued. Since the ground last stated was sustained, it is unnecessary to recite in detail the facts and circumstances surrounding the controversy. It will suffice to refer to the legal questions sought to be raised by Arizona, and the Court's conclusion that

they cannot be adjudicated in the absence of the United States as a party. As to these, Mr. JUSTICE STONE said:

"Arizona insists that this court, in adjudicating the rights of states in the water of interstate streams, has declared that it will not hold itself restricted to rigid application of local rules of law governing private rights; that independently of those rules it may have recourse to applicable principles of international law and equity tending to secure to sovereign states equality of right in such water. . . It points out that departure from the local formula may be compelled where the contending states apply, locally, different and irreconcilable doctrines. . . and that the common law of private riparian rights has been modified, even in suits between states adhering to it, by the application of principles of equitable apportionment. . . But we have no occasion to consider the arguments urged upon us in support of the adoption, in this case, of a different rule from that of appropriation, as applied locally, for we are of the opinion that in the circumstances disclosed by the bill of complaint there can be no adjudication of rights in the unappropriated water of the Colorado River without the presence, as a party, of the United States, which, without its consent is not subject to suit even by a state."

The interest of the United States and the rights of Arizona in relation to the matters in controversy were thus described:

"Without more detailed statement of the facts disclosed, it is evident that the United States, by Congressional legislation and by acts of its officers which that legislation authorizes, has undertaken, in the asserted exercise of its authority to control navigation, to impound, and control the disposition of, the surplus water in the river not already appropriated. The defendant states contend, and Arizona does not deny, that the natural dependable flow of the river is already over-appropriated, and it does not appear that without the storage of the impounded water any substantial amount of water would be available for appropriation.

"The decree sought has no relation to any present use of the water thus impounded which infringes rights which Arizona may assert subject to superior but unexercised powers of the United States. . . The prayer is for a decree of equitable division of the privilege of future appropriation. The relief asked, and that which upon the facts alleged would alone be of benefit to Arizona, is a decree adjudicating to petitioners the 'unclouded . . . rights to the permanent use of' the water. Such a decree could not be framed without the adjudication of the superior rights asserted by the United States. The 'equitable share' of Arizona in the unappropriated water impounded above Boulder Dam could not be determined without ascertaining the rights of the United States to dispose of that water in aid and support of its project to control navigation, and without challenging the dispositions already agreed to by the Secretary's contracts with the California corporations, and the provision as well of § 5 of the Boulder Canyon Project Act that no person shall be entitled to the stored water except by contract with the Secretary. . .

"Every right which Arizona asserts is so subordinate to and dependent upon the rights and the exercise of an authority asserted by the United States that no final determination of the one can be made without a determination of the extent of the other. Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality. . . A bill of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party. . .

"The petition to file the proposed bill of complaint is denied. We leave undecided the question whether an equitable division of the unappropriated water of the river can be decreed in a suit in which the United States and the

interested states are parties. Arizona will be free to assert such rights as she may have acquired, whether under the Boulder Canyon Project Act and California's undertaking to restrict her own use of the water or otherwise, and to challenge, in any appropriate judicial proceeding, any act of the Secretary of the Interior or others, either states or individuals, injurious to it and in excess of their lawful authority."

The case was argued by Mr. James R. Moore for Arizona, and by Mr. William W. Ray for defendants State of Colorado et al., and by Mr. Phil D. Swing for defendants State of California et al.

Taxation—Income Tax—Capital Gains

The capital gains tax, accruing after the sale of preferred stock, is computed on the excess of proceeds of sale over cost. Common stock, given as dividends on the preferred stock in lieu of cash accrued and available for that purpose, is income. It is not to be regarded as capital gain or applied in reduction of the cost of the preferred stock.

Koshland v. Helvering, 80 Adv. Op. 845; 56 Sup. Ct. Rep. 767.

The question involved here was whether, under the Revenue Acts of 1926 and 1928, upon sale of preferred stock upon which common stock had been issued as a dividend between the purchase and sale of the preferred stock, the seller must apportion the cost between the preferred and common stock in determining gain or loss.

The articles of incorporation of the issuing corporation provided for a stated cash dividend on the preferred stock or at the company's option one share of common stock for each share of preferred. The common stock had voting rights, but the preferred had none, and the latter was redeemable at \$105. a share plus accrued dividends.

During the years 1925 to 1928, inclusive, there was surplus enough to pay the preferred dividend in cash, but the company elected to pay in common stock. In 1930 the preferred stock was redeemed. In computing the gain, the Commissioner allocated to the common stock received as dividends, a proportionate amount of the cost of the preferred, thereby reducing the cost and increasing the gain on the sale. The Board of Tax Appeals held that the stock dividends were income and reversed the ruling. But the Circuit Court of Appeals sustained the Commissioner and reversed the Board. On certiorari the decision was again reversed by the Supreme Court, and the ruling of the Board was sustained.

MR. JUSTICE ROBERTS delivered the opinion of the Court, and stated that the dividends were income and may not be treated as returns of capital. In reaching a decision of the case, MR. JUSTICE ROBERTS pointed out that *Eisner v. Macomber*, 252 U. S. 189, ruled that a common stock dividend to common stockholders was not income, and hence that power to tax the same had not been granted by the Sixteenth Amendment. The basis of the ruling was that the stock dividend accomplished no severance of corporate assets, and the preexisting interests of stockholders continued in the same proportion. Thereafter, the Treasury issued regulations to exempt all income in the form of stock dividends.

The effect of *Eisner v. Macomber* and the scope of the Treasury regulations was then discussed. As to them the opinion states:

"Although *Eisner v. Macomber* affected only the taxation of dividends declared in the same stock as that pres-

ently held by the taxpayer, the Treasury gave the decision a broader interpretation which Congress followed in the Act of 1921. Soon after the passage of that Act, this court pointed out the distinction between a stock dividend which worked no change in the corporate entity, the same interest in the same corporation being represented after the distribution by more shares of precisely the same character, and such a dividend where there had either been changes of corporate identity or a change in the nature of the shares issued as dividends whereby the proportional interest of the stockholder after the distribution was essentially different from his former interest. Nevertheless the successive statutes and Treasury regulations respecting taxation of stock dividends remained unaltered. We give great weight to an administrative interpretation long and consistently followed, particularly when the Congress, presumably with that construction in mind, has reenacted the statute without change. The question here, however, is not merely of our adopting the administrative construction but whether it should be adopted if in effect it converts an income tax into a capital levy. . .

"The property disposed of was the petitioner's preferred stock. In plain terms the statute directs the subtraction of its cost from the proceeds of its redemption, if the latter sum be the greater. But we are told that Treasury Regulations long in force require an allocation of the original cost between the preferred stock purchased and the common stock received as dividend. And it is said that while no provision of the statute authorizes a specific regulation respecting this matter, the general power conferred by the law to make appropriate regulations comprehends the subject. Where the act uses ambiguous terms, or is of doubtful construction, a clarifying regulation or one indicating the method of its application to specific cases not only is permissible but is to be given great weight by the courts. And the same principle governs where the statute merely expresses a general rule and invests the Secretary of the Treasury with authority to promulgate regulations appropriate to its enforcement. But where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation. Congress having clearly and specifically declared that in taxing income arising from capital gain the cost of the asset disposed of shall be the measure of the income, the Secretary of the Treasury is without power by regulatory amendment to add a provision that income derived from the capital asset shall be used to reduce cost."

MR. JUSTICE STONE and MR. JUSTICE CARDOZO were of opinion that the judgment should be affirmed.

The case was argued by Mr. John C. Altman for the petitioner, and by Assistant Attorney General Jackson for respondent.

Injunction—Relief Against Unconstitutional Statute—Standing to Bring Suit

In order to challenge a statute on the ground of constitutional invalidity, the plaintiff must show that he is injured by the alleged unconstitutional provisions of such statute.

Premier-Pabst Sales Company v. Grosscup, et al., 80, Adv. Op. 830; 56 Sup. Ct. Rep. 754.

In view of the widespread misconception that the Supreme Court claims and seeks to exercise a veto power over State and Federal legislation, this case should be illuminating.

The appellant, Premier-Pabst Sales Company, is a Delaware corporation which distributes beer made in Illinois and Wisconsin. It engages in such business in Pennsylvania under license issued under a statute passed there in 1933. The Act was amended in 1935, so as to discriminate against distributors of beer made outside the state, by imposing a license fee of \$900. on them and requiring of them a bond with penalty of

\$2,000., whereas distributors of beer made in the state are subjected to a license fee of \$400. and are required to give bond with a penalty set at \$1,000.

The appellant sought an injunction against enforcement of the statute as violative of the equal protection and Commerce clauses of the Federal Constitution. The district court dismissed the suit for want of equity. On appeal, this was affirmed by the Supreme Court, in an opinion by MR. JUSTICE BRANDEIS. In his opinion he pointed out that the appellant could not have obtained a license in any event because of other requirements of the state law and hence was in no position to challenge the provisions in question. As to this, the opinion states:

"We have no occasion to consider the constitutional question, because it appears that the plaintiff its without standing to present it. One who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him. . . . Under the Act of 1935, no one may sell beer in Pennsylvania unless duly licensed; and no license may issue to a corporation unless all its officers and directors, and fifty-one per cent of its stockholders, have been residents of the State for the period of at least two years prior to the application for a license. The constitutional validity of that provision is conceded; and it was agreed that all the officers and directors are, and were when the suit was begun, non-residents of Pennsylvania, and that all of its stock was, and is, held by another foreign corporation. As no license could legally issue to the Company in any event, it cannot be injured by the alleged unconstitutional discrimination; and hence has no standing to challenge provisions of the Act."

The case was argued by Messrs. M. J. Donnelly and C. J. Lynch Jr. for the appellant. The Court declined to hear further argument.

Rate Regulation—Service Rates Under the Packers and Stockyards Act

In determining reasonable rates to be charged by market agencies, under the Packers and Stockyards Act, no allowance should be made for hypothetical salaries to proprietors of agencies, which would load the business with a cost having no relation to actualities. The Secretary of Agriculture, in determining such rates, is not precluded from inquiry into extravagant and wasteful expenditures.

On a judicial review of the rate order, the complainants are not entitled to a trial *de novo* as in confiscation cases, since the rates relate largely to personal services, and no question of confiscation is involved.

Acker et al. v. United States, et al., 80, Adv. Op. 801; 56 Sup. Ct. Rep. 824.

This opinion, delivered by MR. JUSTICE ROBERTS, related to the validity of an order of the Secretary of Agriculture declaring unreasonable the rates charged by marketing agencies at the Union Stockyards at Chicago, and fixing new maximum rates. The proceedings had by the Secretary were under the Packers and Stockyards Act, 1921. The new rates were ordered after hearings and argument, and were based on findings of fact. After the entry of the order, a rehearing was denied, but by a supplemental order some rates were increased.

In a suit brought to enjoin the orders made, a federal court of three judges dismissed the bill of complaint on final hearing, after accepting evidence additional to that presented to the Secretary. That court adopted the findings of the Secretary and held

that his findings were supported by substantial evidence.

The appellants contended that the Secretary had failed to apply the principles approved by the Supreme Court for determining reasonable rates; that he had improperly invaded the field of management in determining reasonable unit costs; had used an improper test period; had disregarded evidence in fixing an allowance for salesmanship costs and the expense of getting business; and had arbitrarily denied petitions for rehearing.

On appeal, the decree was affirmed by the Supreme Court. In dealing with the appeal, MR. JUSTICE ROBERTS referred to *Tagg Bros. & Moorehead v. United States*, 280 U. S. 421, for a description of the services performed by commission merchants, and pointed out that little capital is employed, and that the business is the rendering of personal services for which charges are made according to a uniform schedule. In determining the rates, the prime factor is the agencies' costs, of which the most important are salesmen's compensation and the expense of getting and maintaining business.

The attack made by the appellants was not on the principles invoked, but on the application of the principles in this instance. One object of attack was the allowance for salesmen's salaries. It was based on the fact that the Secretary refused to adopt an average of salaries previously paid. But the court concluded that he was not required to do so, since the services and fair recompense therefor is a matter of judgment based on all the facts. The claim was made also that an allowance should be made for salaries for proprietors, although they in fact receive no salaries. This contention was rejected. As to it the opinion stated:

"The appellants insisted that the Secretary should in his cost computations fix a salary allowance for such owners without reference to their actual earnings. In order to furnish a basis for a finding in this behalf they procured independent persons, said to have knowledge of the subject, to make appraisals of the value of the services of these owners and introduced the appraisals in evidence. They insist that because the Secretary in arriving at selling costs ignored these hypothetical salaries his action was arbitrary and unreasonable. We cannot so hold. We think it evident that he was justified in considering conditions as he found them and refusing to load the business with a cost having no relation to actualities."

In connection with the cost of getting and maintaining business, an analysis of actual expenditures was considered. Some of the expenditures were found extravagant and wasteful. Inquiry into this was objected to as an invasion of managerial judgment. The objection was found without merit, however, the Court saying:

"this overlooks the consideration that the charge is for a public service, and regulation cannot be frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs for these or any purposes. We are not persuaded that the conclusions as to proper allowances on this head were without substantial support in the record."

Objections were also made to the order on the ground that the test period was not proper, and because changes in economic conditions rendered arbitrary the denial of petitions for rehearing. These objections were found without merit.

The appellants contended also that they were entitled to a trial *de novo* in court on the issue of confiscation. This contention was rejected, on the ground

that no question of confiscation was involved. With respect to this the Court said:

"It is to be noted that in spite of the allegations of the bill the case does not involve any question of confiscation. The appellants employ little physical property in their business and no complaint is made as to the allowance of interest on such as they do employ. They render a personal service and the issue before the Secretary was whether the uniform schedule of rates for that service was or was not reasonable. On this issue he was bound to afford the appellants due process. In fact he gave them adequate notice and accorded them a full hearing. He carefully weighed the evidence, as demonstrated by voluminous and detailed findings; he exposed with candor the facts and considerations forming the basis of his ultimate conclusions. The appellants had opportunity for a full presentation of their case. Under Section 316 of the Packers and Stockyards Act the district court sits not to afford a trial *de novo* but to review the administrative action. . . . No reason appears why the appellants could not be afforded due process of law by a review of any questions they deemed material upon the record as made in the administrative proceeding, or why the delay, expense and burden of a new trial should be imposed simply because they demanded it. The issue before the Secretary was not confiscation but the reasonableness of a charge for personal service. No new or different issue could have been presented upon a trial *de novo*. We think the court correctly held that its function was the consideration of questions raised upon the record made before the Secretary."

The case was argued by Mr. George J. Haight for the appellants, and by Assistant Attorney General Dickinson for the appellees.

Administrative Law—Regulation of Rates of Secretary of Agriculture Under the Packers and Stockyards Act

The hearing as to the reasonableness of and the exercise of the power to regulate rates, cannot be separated. The full hearing prescribed by the Act contemplates that the official determining the rates shall also be the official who heard evidence and argument as to the issues involved.

Morgan et al. v. United States et al., 80 Adv. Op. 901; 56 Sup. Ct. Rep. 906.

The opinion in this case related to fifty cases, consolidated for purposes of trial, brought to restrain enforcement of an order of the Secretary of Agriculture, fixing maximum rates to be charged by market agencies for buying and selling livestock at the Kansas City Stockyards. The order was made after the taking of voluminous evidence. The appellants attacked the order as violative of the due process clause of the Fifth Amendment. Appellants alleged that the Secretary made the rate order without having heard or read evidence or argument.

The district court of three judges dismissed the bills of complaint. On direct appeal the decree was reversed by the Supreme Court in an opinion by Mr. CHIEF JUSTICE HUGHES. The principal question considered was one as to administrative procedure, and the Court's view of this matter only will be dealt with here.

The evidence was taken before an examiner; oral argument on the evidence was had before the Acting Secretary of Agriculture; and the findings of fact, conclusions, and order fixing rates were signed by the Secretary of Agriculture. Objections to the procedure, as a denial of the full hearing required by statute, were duly made by the appellants, and these objections were sustained by the Supreme Court. In

considering the question, care was taken to point out that no question was involved as to any delegation of power to the Acting Secretary. With reference to this Mr. CHIEF JUSTICE HUGHES observed:

"Nor should the fundamental question be confused with one of mere delegation of authority. The Government urges that the Acting Secretary who heard the oral argument was in fact the Assistant Secretary of Agriculture whose duties are prescribed by the Act of February 9, 1889 (5 U. S. C. 517), providing for his appointment and authorizing him to perform such duties in the conduct of the business of the Department of Agriculture as may be assigned to him by the Secretary. If the Secretary had assigned to the Assistant Secretary the duty of holding the hearing, and the Assistant Secretary accordingly had received the evidence taken by the examiner, had heard argument thereon and had then found the essential facts and made the order upon his findings, we should have had simply the question of delegation. But while the Assistant Secretary heard argument he did not make the decision. The Secretary who, according to the allegation, had neither heard nor read evidence or argument, undertook to make the findings and fix the rates. The Assistant Secretary, who had heard, assumed no responsibility for the findings or order, and the Secretary, who had not heard, did assume that responsibility.

"We may likewise put aside the contention as to the circumstances in which an Acting Secretary may take the place of his chief. In the course of administrative routine, the disposition of official matters by an Acting Secretary is frequently necessary and the integrity of administration demands that credit be given to his action in that capacity. We have no such question here. The Acting Secretary did not assume to make the order."

As to the fundamental question concerning the essential quality of the proceeding and the nature of the hearing required, the Court emphasized that it is a *quasi-judicial* proceeding in which the person deciding the case must also consider the evidence and the argument. With reference to this the opinion states:

"The Secretary, as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed. Congress has required the Secretary to determine, as a condition of his action, that the existing rates are or will be 'unjust, unreasonable, or discriminatory.' If and when he so finds, he may 'determine and prescribe' what shall be the just and reasonable rate, or the maximum or minimum rate, thereafter to be charged. That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. . . .

"A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi-judicial* character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other

fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.

"There is thus no basis for the contention that the authority conferred by section 310 of the Packers and Stockyards Act is given to the Department of Agriculture, as a department in the administrative sense, so that one official may examine evidence, and another official who has not considered the evidence may make the findings and order. In such a view, it would be possible, for example, for one official to hear the evidence and argument and arrive at certain conclusions of fact, and another official who had not heard or considered either evidence or argument to overrule those conclusions and for reasons of policy to announce entirely different ones. It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

"This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

The case was argued by Messrs. Frederick H. Wood and John B. Gage for the appellants, and by Assistant Attorney General Dickinson for the appellees.

State Statutes—Taxation—Privilege Tax on Automobiles Moving in Interstate Commerce

It is within the power of a state, consistently with the commerce clause and with the due process and equal protection clauses of the Fourteenth Amendment, to impose a permit fee, for the privilege of using state highways, on all persons transporting automobiles in caravans for purposes of sale, whether transported in interstate commerce or not.

Morf. v. Bingaman, 80 Adv. Op. 840; 56 C. Sup. Ct. Rep. 756.

This opinion dealt with the validity of a statute of New Mexico imposing a license fee on the privilege of transporting motor vehicles over state highways for purposes of sale. The suit arose on a bill for an injunction to restrain enforcement of the statute. The district court dismissed the bill, and on appeal the decree was affirmed by the Supreme Court, in an opinion by MR. JUSTICE STONE.

The statute, Chapter 56 of the Laws of 1935, denies to all persons the use of state highways for the transportation of any motor vehicle, on its own wheels, for purpose of sale within or without the state, unless the vehicle is (1) licensed by the state, or (2) owned by a licensed dealer and operated under a dealer's license, or (3) operated under a special permit issued

by the Commissioner of Revenue for its transportation. A fee of \$7.50 is charged for the permit if the vehicle is transported by its own power, and \$5.00 is charged if it is towed or drawn by another vehicle.

A later Act, Chapter 136 of the Laws of 1935, provides for the establishing of "ports of entry" on the main highways of the state, at which permits are to be issued and fees collected. It provides that no permit shall issue and no vehicle be allowed to pass until the vehicle is inspected and found in a safe and roadworthy condition, properly equipped with lights, brakes, and other appliances, as required by law.

The appellant, a resident and citizen of California, purchases used and new cars in other states and transports them, on their own wheels, over state highways to California, where he offers them for sale. They are transported through New Mexico for about 165 miles in caravans, or processions.

Chapter 56 is challenged as imposing an undue burden on interstate commerce, and as infringing the due process and equal protection clauses of the Fourteenth Amendment. The claim was also made that Chapter 136 repealed Chapter 56. The trial court upheld the statute as imposing a permit fee for the privilege of using the highways, and as not exempting cars operated under a dealer's license when transported for sale.

Affirming the decree, the Supreme Court first summarized the considerations which led to the enactment of the statute for the purpose of controlling a hazardous class of traffic. It then stated its conclusion that there was adequate basis for the levy as a non-discriminatory tax for the privilege of using the highways consistent with the commerce clause. MR. JUSTICE STONE said:

"There is ample support for a legislative determination that the peculiar character of this traffic involves a special type of use of the highways, with enhanced wear and tear on the roads and augmented hazards to other traffic, which imposes on the state a heavier financial burden for highway maintenance and policing than do other types of motor car traffic. We cannot say that these circumstances do not afford an adequate basis for special licensing and taxing provisions, whose only effect, even when applied to interstate traffic, is to enable the state to police it, and to impose upon it a reasonable charge, to defray the burden of this state expense, and for the privilege of using the state highways.

"As the tax is not on the use of the highways but on the privilege of using them, without specific limitation as to mileage, the levy of a flat fee not shown to be unreasonable in amount, rather than of a fee based on mileage, is not a forbidden burden on interstate commerce. . .

"Nor is it important that a part of the fees collected is not devoted directly to highway maintenance, the cost of which the state pays in part from the proceeds of a general property tax. The use for highway maintenance of a fee collected from automobile owners may be of significance, when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways. . . But where the manner of the levy, like that prescribed by the present statute, definitely identifies it as a fee charged for the grant of the privilege, it is immaterial whether the state places the fees collected in the pocket out of which it pays highway maintenance charges or in some other."

Consideration was then given to the contention that the classification is objectionable as to cars operated singly for sale, on the ground that they do not differ from cars transported for other purposes. This contention was met with the answer that it ignores the circumstances in which the statute is applied, and

that it is one which the appellant has no standing to assert. In elaboration of this, MR. JUSTICE STONE said:

"There is nothing in the Fourteenth Amendment which requires classification for taxation to follow any particular form of words. If that adopted results in the application of the tax to a class which may be separately taxed without a denial of equal protection, those within the class who are called upon to pay the tax cannot complain that the taxed class might have been more aptly defined, or that the statute may tax others who are not within the class. Here it is the practice of transporting automobiles over the highways for purpose of sale which has given rise to the practice of moving them in caravans. The use of automobiles for other business purposes, or for pleasure, does not have that result. So far as it appears, the movement of cars singly for purposes of sale is negligible, and it is shown affirmatively that the cars transported for sale by appellant move in caravans. The classification of the statute thus, in its practical operation, embraces and is constitutionally applicable to cars moving in caravans, the class of traffic in which the appellant engages and on which he is alone taxed. Such discrimination as there may be is not between those who, like appellant, drive their automobiles to market in caravans and others who drive them singly, for both are taxed. Discrimination, if any, is between those who drive their cars to market singly and others who drive them for other purposes, and may be subjected to a different tax. Appellant does not assert that he belongs to either class. As the traffic in which he participates is properly taxed he cannot complain of the imposition of the tax on a business which he does not do. . . We have no occasion to pass upon the validity of the tax as applied to cars driven singly."

In conclusion the Court stated that it found no reason for rejecting the trial court's view that the challenged statute was not repealed by Chapter 136, passed a week later.

The case was argued by Messrs. Ralph K. Dier-son and George E. Remley for the appellant, and by Messrs. Quincy D. Adams and Frank H. Patton for the appellee.

Patents—Computation of Damages and Profits for Infringement

In computing profits in a suit for infringement of a patent, factory losses incurred as a necessary or normal incident to the completion of sales effected at a gain, may be offset by the infringer.

No allowances will be made to the infringer for the cost of the products sold, but later returned by the purchaser for defects discovered afterwards, since no profits are charged against the infringer for such sales.

Materials purchased for use in the manufacture of the product will be credited to the infringer at actual cost, where it is lower than market value.

The infringer will not be allowed any royalty for savings effected by the use of devices on which he holds patents.

Duplate Corporation et al v. Triplex Safety Glass Co., 80 Adv. Op. 834; 56 Sup. Ct. Rep. 792.

This opinion dealt with questions as to the measure of liability for infringement of a patent.

The respondent, complainant in the trial court, is the owner of a patent, No. 1,182,739, covering the making of shatter-proof glass, used largely in the manufacture of automobiles. In the process of manufacture, a sheet of pyralin or celluloid is sandwiched between two thin sheets of plate glass, each $\frac{1}{8}$ of an inch thick, the pyralin being cemented to the glass by

a film of gelatin. To induce adhesion, heat and pressure are applied to the "sandwiches" in a steel boiler of large size, known as an autoclave.

The complainant obtained a decree against Duplate Corporation for infringement of this patent. A supplemental decree was later obtained against the petitioner, Pittsburgh Plate Glass Company, the owner of 50% of the stock of Duplate, as a contributory infringer, supplying glass in the manufacture. The defendants satisfied the master that they were not deliberate infringers and the account of damages and profits is stated on the theory that the defendants acted in good faith. The District Court modified the master's report, and the Circuit Court of Appeals made further modifications. On certiorari, the Supreme Court, in an opinion by MR. JUSTICE CARDOZO, directed further modifications in the decree.

The controversy centers around two aspects: (1) the defendants' profits; and (2) the complainant's damages. Under the first of these headings, an important item was the propriety of an allowance for labor and material consumed in products wasted. In this connection Mr. Justice Cardozo reviewed the difficulties of manufacture to illustrate that a considerable fraction of the product is unavoidably wasted. In view of this, the Court sustained an allowance for factory losses incurred as a necessary or normal incident to the completion of sales effected at a gain. As to this, the opinion states:

"A sale resulting in a loss may not be offset by an infringer against another and independent sale resulting in a gain for the purpose of extinguishing or reducing a liability for profits. * * * On the other hand, the extent of the gain resulting from a sale is not susceptible of ascertainment without the deduction and allowance of the incidental costs. * * * To make the product of a factory ready for the market labor and material must be consumed by the seller-manufacturer. The cost of such consumption does not cease to be a charge against the proceeds because viewed in isolation it may be classified as waste. If the waste is unavoidable or even fairly to be expected in the normal course of such a business there is a diminution of the profits for an infringer as for others. * * * 'Losses occurring concurrently with the gaining of profits should be taken into account, if they resulted from the particular transaction on which profits are allowed.' * * * They are the charges that must be known before profits can be estimated."

Next considered were allowances for the cost of glass sold by Duplate to its customers, and returned by them for defects later discovered. Since no profit was charged the sellers on account of these, they were thought not entitled to any credit. Of them the Court said:

"These sales were mere futilities. They did not yield a profit for which the sellers have been charged. They were not preliminary to other sales refilling the same orders. At least there is nothing in the record to imprint that quality upon them. They have no place in the account at all. By the ruling of the master the cost of these futilities was allowed to the infringers. This we think was error. The infringers being relieved of any charge by reason of such transactions are not entitled to a credit. The case of the *Crosby Valve Company* (141 U. S. 441, 457) gives the applicable rule. The very equities that exact the allowance of a credit where costs are but a means to realizing a profit, exact a different conclusion where profit is impossible."

The item next discussed was the allowance for glass furnished by the Pittsburgh Company to Duplate,

(Continued on page 649)

THE GOVERNMENT'S HOUSING PROGRAM TO DATE

A Brief Survey of Governmental Activities in This Field and Certain Recently Enacted Legislation—Failure of Local Efforts to Promote Better Housing—Different Branches of Government's Housing Program—Vital Problems of Relationship of State and Nation Raised by These National Undertakings—The Resettlement Administration—Home Financing, etc.*

By JOHN W. BRABNER SMITH

Counsel for the Federal Housing Administration

A LITTLE more than three years ago our national government followed the example set by England and other European governments of entering the housing field. The immediate object of Congress was to stimulate the building industry and give employment to the then alarming army of unemployed laborers and skilled workmen. Fundamentally, however, our housing problem consists in securing for American families such home surroundings as will promote the health, morals, and general welfare of our citizens at a rental within their income.

The need for housing—as distinguished from the social problem of better housing conditions—is frequently referred to as the "housing problem," because the depression has emphasized the necessity of furnishing employment, and the building industry is gravely in need of stimulation. Although we were probably overbuilt in 1930, the steady increase in number of families, the continuing factor of obsolescence, and the scarcity of new construction during the succeeding years has resulted in a housing deficit variously estimated at from 1,000,000 to 2,000,000 family dwelling units. Whatever basis is used, it appears that the deficit is at least as great as that which developed during and immediately following the World War, and which led to the great home building activity of the 1920's.¹

Fortunately, the social problem and the economic aspect of housing are closely related. For instance, there are approximately one and one-half million families in this country paying rent of less than \$10 per month, and over two and one-half million more paying a rental of from \$10 to \$20 per month. At once this indicates the extent of the need for better housing, the enormous potential employment market in the construction thereof, and the necessity for governmental participation by subsidy, since it is apparent that private capital cannot entirely finance such an undertaking and obtain any reasonable profit. In fact, it has been asserted on good authority that one-third of the wage earners in this country do not earn enough money to afford what we would call decent housing.

*This article brings up to date a similar discussion in the *Illinois Law Review* of January, 1936.

1. The average number of dwelling units provided annually from 1931 to 1935 has been only 12.7% as great as the average from 1921 to 1930. At the start of the depression hundreds of thousands of urban workers returned to live with relatives on farms; and there was a deferment of several hundred thousand marriages, with the result that residential vacan-

The national government already has made available approximately \$100,000,000 from the gigantic emergency relief appropriation and approximately \$31,000,000 from the National Industrial Recovery appropriation for public works. This does not, of course, include the vast program of indirect financing under the Federal Housing Administration and the Home Loan Bank System.

The scope of this program is such that it will affect practically every one of us, and some of the legal questions involved already have been presented to lower courts. Let us examine briefly governmental activities in this field, including recently enacted legislation.

The first important effort of our national government directed toward the housing problem was President Hoover's Conference on Home Building and Home Ownership in December, 1931. Every phase of housing was discussed, but the most important conclusion was that it was essential for the national government to lend its efforts by assisting in home financing. As a result, nine months later the Federal Home Loan Bank Act was passed, which is discussed hereafter. More important, however, public interest was stimulated and America commenced to become "housing conscious."

The first federal funds to be made directly available for housing resulted from the Emergency Relief and Construction Act of 1932,² which set up the Reconstruction Finance Corporation. This corporation was authorized incidentally to make loans to state or municipally regulated low-cost, limited-dividend, housing corporations formed for the purpose of providing housing for families of small income, or for the reconstruction of slum areas. Only two loans were made for such purposes showed a marked increase in spite of the annual growth in population.

Since 1933, however, the percentage of vacancies has been declining as a result of the improvement in business and employment, the continuous increase in population, and the recovery in the number of marriages. Rents have risen, and in 1935 home building activity more than doubled the rate during 1933 and 1934.

Under such conditions it is imperative that home building activity keep up with the demand, otherwise there is the danger of a perpendicular rise in rents, of building low quality houses to sell at inflated prices, and other evils. To keep pace with the effective demand the building industry must, in the near future, be prepared to build houses and apartments at a rate comparable to that attained during the 1920's, if only to sustain standards already attained. (See Senate Committee Report on Housing Act of 1936 for statistics.)

2. 47 Stat. 5 (1932), 15 U. S. C. A. § 601 (1934).

poses, but the Act had considerable effect in stimulating the passage of state laws providing for the creation and regulation of housing companies. Moreover, the idea of housing as part of a public works program is here, and it appears fully developed a few months later in President Roosevelt's National Industrial Recovery legislation (NIRA)³ authorizing loans, and, for the first time, grants, for the construction, repair or improvement of low-cost housing and slum clearance projects under public regulation or control, with a view to "increasing employment quickly." However, the principle was retained that supervision and control should be local. As the initiative of state, municipal, and private housing organizations continued to lag, the government finally undertook the direct construction of housing projects, also permitted by the Recovery Act.

Failure of Local Efforts

Prior to this entry of the national government in the field, governmental aid consisted principally of those laws in a few states permitting the incorporation of private limited-dividend housing corporations invested, generally, with the right of eminent domain and the privilege of tax exemption.⁴ In addition there were some cases of municipal financing of pavements, sewers, water mains, electric lines and other utilities conducive to better housing. The first of these state laws was enacted in 1926⁵ as the result of the efforts of Governor Alfred E. Smith. A state housing board was set up with power to supervise and regulate all the operations of the limited-dividend housing corporations. It was also empowered to make studies in every field relating to housing. However, private capital was not forthcoming in spite of the Governor's efforts, and only a few projects were completed. The solution of the problem of financing the construction of housing projects on a large scale did not begin until Congress became frantic to put people to work.

When Congress enacted the Emergency Relief and Construction Act, referred to above, fourteen states at once adopted housing laws, similar to the New York Act, to enable local corporations to organize and qualify for federal loans.⁶ Following the organization of the Public Works Administration (PWA), authorized by the N. I. R. A. to make grants to local governmental projects,⁷ a number of states also enacted legislation providing for local housing authorities, in an endeavor to obtain federal grants. In most instances these authorities are empowered to acquire property, to construct and manage housing projects, and to obtain limited funds from the state. Although a number of these

instrumentalities have been organized,⁸ their activities have been very limited. Thus the burden, not only of financing, but of management must be borne, for the present at least, by the national government.⁹

Government Housing Program

The housing activities of the national government up to the present may be classified as follows: housing construction and financing, indirect financing, and education. The direct federal housing program may be divided thus:

1. Housing erected by private individuals formed into limited-dividend corporations and financed largely by the Government through the PWA, the independent Government agency created by the N. I. R. A.

2. PWA housing, financed and built by the Government.

3. Subsistence homestead projects, provided for under direction of the Interior Department and completely financed by the Government. (These projects are now under the Resettlement Administration.)

4. Rural rehabilitation housing, financed entirely by the Government and developed by the Federal Emergency Relief Administration. (Now absorbed by the Resettlement Administration.)

5. Rural Resettlement and Suburban Resettlement, divisions of the Resettlement Administration, financed by funds from the President's works relief fund.

It will be recalled that the Public Works Administration first attacked the housing problem with the idea of financing private corporations whose dividends were limited to 6 per cent. Subject to state supervision, these corporations would acquire property, build houses and apartments, and attempt to operate them at a profit. The federal government would finance them up to 85 per cent of the total cost, the loans to be repaid within 40 years. As it was evident that substantial groups willing to undertake the risk could not be found at that time, this plan was abandoned after seven projects had been started. However, all of these are now completed, and are fully occupied.¹⁰ Although the buildings have all modern conveniences, and rentals are very moderate, these projects do not assist materially in the solution of the low-cost housing problem, for the rentals average approximately \$10 per room per month, and housing experts place the maximum rental per room for low-cost housing at a much lower figure.

With the failure of private capital to enter limited-dividend corporation financing, and because of the inactivity of state housing authorities, the PWA undertook directly to build and operate urban housing projects. About 50 large projects are now

3. 48 Stat. 201 (1933), 40 U. S. C. A. § 402 (1934).

4. See Ralph K. Chase, *Drafting of Housing Legislation* (1934). 1 Law and Contem. Prob. 185.

5. N. Y. Laws 1926, c. 823; amended by Laws 1927, c. 35; Laws 1928, c. 722; Laws 1930, c. 872; Laws 1931, c.'s 557 and 558; and Laws 1932, c. 507.

6. These states were California, Delaware, Florida, Illinois, Kansas, Kentucky, Massachusetts, New Jersey, North Carolina, Ohio, South Carolina, Texas and Virginia. For a further description of this legislation see Fisher, *Federal Housing and Home Loan Legislation* (1934), 32 Mich. L. Rev. 943; Chase, *loc. cit. supra* note 4.

7. *Supra*, Note 3.

8. There are municipal housing authorities in New York City, Schenectady, Buffalo, Cleveland, Cincinnati, Dayton, Toledo, Columbus, Youngstown, Warren, Lexington, Kentucky, Detroit, and Columbia, South Carolina.

9. For a summary of the entire field of housing activities in the United States prior to participation by the National Government, see the *Reports of the Hoover Conference on Home Building and Home Ownership*, and the *Symposium in* (1934) 1 Law and Contem. Prob. 135.

10. These projects are in Altavista, Virginia, Bronx, New York, Euclid, Ohio, Philadelphia, Pennsylvania, Queens, New York, Raleigh, North Carolina, and St. Louis, Missouri.

in process of construction which will house approximately 100,000 persons.

The PWA has been seriously handicapped in the acquisition of real estate upon which to construct the projects. It has not yet been determined whether an agency of the National Government may acquire property by eminent domain as incidental to the erection of housing projects, but it is now considered doubtful. Unfortunately the question has not been definitely answered because the Government withdrew the case of *United States v. Certain Lands in the City of Louisville*¹¹ prior to argument before the Supreme Court. Without the power of eminent domain no national agency, unassisted by the states or other local instrumentalities, can hope to accomplish any comprehensive slum clearance, as projects can be erected only on vacant land which is offered for sale.

Another phase of Government housing is rural and suburban home building. Originally, the "Subsistence Homestead" program was under the Interior Department and "Rural Rehabilitation" was under the FERA. These programs have now been transferred to the Resettlement Administration headed by Rexford G. Tugwell. This is an independent governmental agency set up by executive order of April 30, 1935, to administer a portion of the Works Relief Fund.

The subsistence homestead was an idyl in which impoverished victims of the machine age, packed in the slums, are suddenly transmuted to become happy dwellers of rose-covered country cottages. Each family makes a healthy living from the soil, and father pays the installments on the radio and the electric kitchen from his pay envelope at the specialized industry, to be provided by the Government if a private industry is not available, in the vicinity of the homesteads. A number of such projects have been completed.¹² The famous Reedsville, West Virginia, project has had difficulties, for the Comptroller General has ruled his objection to government payments to set up the specialized industry, and private capital must be resorted to hereafter.

Under the Resettlement Administration these projects have been designated "rural-industrial communities." As construction is completed the communities are turned over to local management and ownership. The average cost of a family unit in the latest project at Tupelo, Mississippi, in the Tennessee Valley Authority neighborhood, is \$2,850, and includes four and one-half acres, house, combination garage and chicken house, combination cow stall and tool shed, well and pump house, septic tank and orchard. The cost including taxes and insurance is \$22.04 per month, or approximately one-quarter of the average income of each family (\$1058 per year). This program, modified from time to time, will be continued in an endeavor to make the theory a practical success.

Rural Rehabilitation, under the FERA, was primarily for farm families on relief. Since appli-

cants had to meet but few qualifications, and rent was paid only when work could be found, these were more successful at first. The most famous is the Alaska project, but there are others at Woodlake, Texas, Redhouse, West Virginia, Osceola, Arkansas, Pine Mountain Valley, Georgia, and Cherry Lake, Florida. These communities now house about 1,500 people. Eventually, they may be turned over to the Management Division of the Resettlement Administration. These undertakings should not be confused with the Resettlement Administration's modified rural rehabilitation effort, which is chiefly a farm loan program to assist farmers removed from submarginal land.

The Resettlement Administration has not only modified these types of projects, but has adopted plans for suburban low-cost housing, known as "suburban resettlement," which eliminates battles with landowners in the slums, such as the PWA has fought, but does not eliminate the slums. Mr. Tugwell has purchased tracts of land on the outskirts of various metropolitan centers and is developing them for dwellings for urban workers, furnishing modern and healthy living accommodations at low rental. It is contemplated that these suburban communities will be available only to families with low incomes, the average income probably being about \$1,600. They will have schools, churches, parks and playground in proximity, and will be surrounded by protective areas of agricultural and recreational land. It is not anticipated that these projects will be self-liquidating, although the possibility of the income over a long period covering the expense of financing has not been definitely abandoned in all the developments.

The constitutionality of this agency was not sustained in the recent attack by certain Jerseyites on a proposed "model Community" project in Somerset County for families living in congested areas in nearby manufacturing cities (*Township of Franklin v. Tugwell*, U. S. C. A., D. C., May 18 1936). The District Court found that the provision of the Emergency Relief Appropriation Act authorizing appropriations for "housing" was an unlawful delegation of power, there being nothing further in the Act describing how this money shall be expended, and that this particular expenditure was not authorized by the "general welfare" clause.

The construction and management of housing projects by the National Government has raised three vital problems of relationship of state and nation. First, does federal civil and criminal jurisdiction follow the ownership and management of this property? To assure that local authorities will not lose this jurisdiction and that the tenants will not be disenfranchised or lose other civil rights, such as the privilege of local school education, the George-Healey bill, amending the PWA housing laws (H. R. 1055, S. 3247), enacted just before the 74th Congress adjourned, assures that civil and criminal rights and liabilities are not affected by the acquisition of real property for housing or slum clearance projects under the PWA.

The question of taxes has also proved a big handicap to the successful completion and operation of these projects. The Comptroller General has held (opinion dated October 15, 1935) that the Administrator of Public Works cannot make any payment as a service charge in lieu of taxes, without express authority of law. The governing bodies

11. See 9 F. Supp. 137 (W. D. Ky. 1935), *aff'd*, 78 F. (2d) 684 (C. C. A. 6th, 1935), holding that the Government did not have this power.

12. Homesteads have been completed in Houston, Wichita Falls, Three Rivers and Jefferson County, Texas; Decatur, Indiana; Austin, Minnesota; Tupelo, McComb and Meridian, Mississippi; San Fernando and El Monte, California; Jasper, Alabama; Granger, Iowa; Phoenix, Arizona; and Longview, Washington.

of the various cities where projects are being located insist that the projects should bear a fair share of the tax burdens of the community, but local communities cannot tax federal instrumentalities. The George-Healey amendment permits the Administrator to enter into agreement with local taxing bodies to pay a certain sum in lieu of taxes. This sum is to be based on the cost of the municipal services supplied, but also taking into account the benefits obtained by the taxing unit from the projects.

A third difficulty is raised by the necessity of federal supervision and management of some of the completed projects. It is contemplated that the project eventually will be turned over to local public housing bodies for management. But the delay on the part of many states and local authorities to create proper management units makes necessary temporary federal operation. A doubt has been expressed whether the Federal Government is legally empowered to manage projects. It will be recalled that the constitutional basis of this part of the housing program is the power to appropriate money for the general welfare, and the extent of control which the Federal Government can exert over completed public works has been a source of argument since the early historical debates over internal improvements. However, if there is no competent local authority available to manage the projects upon completion, the Government must undertake this task temporarily. Then the questions arise: Can expenses of operation be paid out of operating income? May rents be set at an amount insufficient to produce a fair return on the original cost? (If a fair return on capital is realized the project is not, technically speaking, low-rent housing.) To these questions the Comptroller General had answered, "no." The George-Healey amendment now permits payments for all operating expenses, including sums in lieu of taxes, out of operating receipts. Moreover, rentals need be no more than sufficient to pay administrative expenses and to amortize 55 per cent of the initial cost of the project within sixty years at a rate of interest determined by the Administrator. This is, in effect, a grant of up to 45 per cent and such further subsidy by way of low interest as the Administrator decides.

In order to assure that these housing projects will not compete with private capital, the George-Healey law provides that dwelling accommodations shall be available only to families who lack sufficient income, without the benefit of financial assistance, to enable them to live in decent, safe and sanitary dwellings, and no family may be accepted as a tenant whose aggregate income exceeds five times the rental, including cost of heat, light, water and cooking.

The Bankhead Bill (H. R. 12876) also enacted at the close of the last session of Congress, is a companion bill of the George-Healey law, providing in a similar manner for a more effective operation of the Resettlement Administration.

The Wagner Bill which provided for a "United States Housing Authority," empowered to conduct research and experimentation relative to housing problems, and to make grants and loans to public housing agencies for the development, acquisition or administration of low-rent housing projects by

such agencies, passed the Senate but Congress adjourned before the House was able to consider the Bill.

The main purpose of this Bill is to enable the President "to gather under one roof" the scattered organizations now empowered to engage in low-rental housing, such as the Housing Division of the PWA, the Suburban Resettlement Division of the Resettlement Administration, and the Low Cost Housing Division of the Federal Housing Administration. The Housing Authority also would be empowered to construct demonstration projects. An independent board is to be created composed of three members appointed by the President and confirmed by the Senate, and the field of activity is carefully delimited so that there will be no competition with private enterprise. Whatever party is in power at the next session of Congress, it is almost certain that the principles of this Bill will be enacted into law.

Government Home Financing Program

The Government's direct housing program so far has furnished housing for only a comparatively few American families and is limited to those of low income (of course, work has been provided for a considerably larger number). However, the home financing operations of the Government have reached over a million families, and are not limited by the family income. The agencies principally devoted to this phase of the housing problem are the Federal Home Loan Bank System and the Federal Housing Administration. The former has indirectly financed the construction or purchase of homes and the refinancing of home mortgages through the Federal Home Loan Banks (which furnish credit to building and loan associations and other home-financing institutions, maintaining somewhat the same position with respect to such associations that the Federal Reserve Banks do to national and state member banks), and the Federal Savings and Loan System, which is composed of building and loan associations having national charters.

The Federal Home Loan Bank System is under the supervision of the Federal Home Loan Bank Board, and is divided into twelve districts with a regional bank in each district. Building and loan associations, savings banks and insurance companies within the district may become members of the system by purchasing stock in the local bank. These members then have power to borrow money at low interest rates from the bank on the security of certain classes of home mortgages. The regional banks obtain funds by selling their partially tax-exempt bonds, secured by such mortgages, to the public. Thus the obtaining of funds by local mortgage lending institutions should be facilitated and the cost of mortgage credit to the home owner lowered and equalized throughout the country. Up to the present no bonds have been offered to the public. Advances of about \$120,000,000 have been made to members, but applications for loans have been slow. The benefits of this agency, as well as of the Home Owners' Loan Corporation and the Federal Housing Administration, discussed hereafter, are available primarily to owners of property housing not more than three or four

families, but this still includes about 90 per cent of the families in this country.¹³

Federal savings and loan associations under the supervision of the Home Loan Banks were authorized in 1933, to provide local mutual institutions for financing home owners in those localities where state associations had ceased to operate because of the freezing of their capital caused by forced liquidation of mortgages and withdrawal of capital by individual shareholders. They are analogous to national banks in the commercial banking field. Many state associations which had practically ceased operations also were able to reorganize into federal associations. With the assistance of new capital obtained by the sale of preferred shares to the Government these associations once more offered their credit to local home mortgage borrowers. This marks a very important advance in the control of the home mortgage credit field by the National Government.

The success of the insurance of banks deposits in January, 1934, resulted in a demand from building and loan associations for a similar insurance of their accounts, which were being withdrawn at an alarming rate, and threatening wholesale liquidation of mutual mortgage credit institutions. Title IV of the National Housing Act, approved June 27, 1934,¹⁴ set up an insurance corporation under supervision of the Home Loan Bank Board. Accounts of federal savings and loan associations must be insured, and similar state institutions may obtain this insurance if they meet certain eligibility standards. This legislation assisted in halting the collapse of the mortgage market and is aiding in the return of home mortgage capital. Its permanence presents practically the same problem as does that of insurance of bank deposits.

The agency of the Home Loan Bank System which is most familiar to the public is the Home Owners' Loan Corporation (HOLC), one of the first of the recovery agencies. The Home Owners' Loan Corporation is engaged in the largest real estate financing operation in the history of the world. The object of this agency was to assist the hundreds of thousands of home owners who became unable to meet mortgage interest and principal payments during the depression. This was accomplished by permitting the HOLC to issue bonds which were exchanged for the home owners' defaulted mortgages, or sold on the market to furnish cash necessary to meet the home owners' mortgage contracts, the Government in either instance replacing the private mortgagees. But the mortgage was not taken over in its old form. In place of the usual short-term mortgage, it substituted fifteen-year mortgages at a lower interest rate and amortized by periodic payments. Approximately a million defaulted home mortgages, totaling over \$3,000,000,000, have been re-financed by the HOLC, and when the history of the agency is written, it will be found that 2,000,000 distressed home owners applied for relief. The HOLC has also spent almost \$50,000,000 in repairs to houses and \$200,000,000 in paying delinquent taxes. Inci-

dentally, it has also saved many mortgage credit institutions with frozen assets from failure by enabling them to liquidate some of their mortgages.

Since the HOLC dealt only with distressed properties, eventually it will have to go through with many foreclosures, and it will be subjected to bitter criticism from those who fail to realize that practically every mortgage refinanced by that institution would have been placed in foreclosure many months previous if it had not been for this Government agency. That the HOLC will accomplish its purpose of saving the homes of thousands of American citizens is already indicated by the fact that over 2,000 distressed home owners who were forced to call upon the HOLC for assistance, have been able to pay off their loans in full. Nevertheless, many banks and other mortgage institutions managed to refinance mortgages which were practically worthless, and the loss will fall on the HOLC.

The Federal Housing Administration (FHA) is an insuring agency—an indirect credit agency, and is an entirely separate department of the Government, provided for by the National Housing Act. Although its immediate objects, similar to the direct housing program of the Government, was to stimulate building and relieve unemployment, it was intended that this should be done by appealing to private capital, rather than by making Government loans. This was to be done by insuring loans for home modernization, for the construction of homes, and for the financing of the purchase of existing homes, such loans to be made by banks, insurance companies, building and loan associations and other private investors. It is interested only in good risks. Thus, this program is now receiving the active support of private business, although conditions were so critical when this Administration commenced, that it was difficult for the prospective home owner to obtain a conservative loan even when thus insured.

Over a million home owners have already obtained money to improve their property through modernization loans. The FHA does not insure individual modernization loans. It contracts with approved lending institutions, as follows: "If you make modernization loans to home owners under Title I of the National Housing Act, we will insure you against loss up to 10 per cent of the total of all loans so made."

The provisions for the insurance of mortgage loans under Title II of the National Housing Act create a Mutual Mortgage Insurance Fund (to which the Government has already appropriated \$10,000,000), this fund to be built up by premiums received from makers of mortgages insured under this title. Briefly, the Act provides for the insuring of long-term, completely amortized mortgages involving a principal amount not to exceed \$16,000 and not to exceed 80 per cent of the appraised value of the property, and bearing interest at a comparatively low rate. Upon default, in order to realize the benefits of his insurance contract, the mortgagee must foreclose or otherwise obtain possession of the premises and transfer it to the Administrator. The insurance is received in the form of debentures in the amount of the unpaid principal and interest and a contingent certificate of claim for any balance of the mortgagor's indebtedness. The debentures are obligations of the Insurance

13. The proportion of our population living in apartments or tenements is increasing much slower than is generally believed. (See Watson, *Housing Problems*, at 7.) Unfortunately, it is in regard to this tenant group that the slum area and other housing problems are most acute.

14. 48 Stat. 1255 (1934), 12 U. S. C. A. § 1724 (1934).

Fund and, if issued and exchanged for mortgages insured prior to July 1, 1937, are fully guaranteed as to principal and interest by the United States.

Through this type of financing, the prospective home owner may finance the purchase of a home with but little more difficulty than is necessary to finance the purchase of an automobile, and payments will be made on a simple installment plan. The large percentage of the loan in proportion to the value of the home is greatly stimulating the purchase of homes and is doing away with the expensive and dangerous practices of second mortgage financing. The cost of this type of loan to the home owner is indicated by the following figures which show the monthly payment required for certain mortgages:

	\$3000-Loan			\$5000-Loan		
	10 years	15 years	20 years	10 years	15 years	20 years
Principal and interest.....	\$31.82	\$23.72	\$19.80	\$53.03	\$39.54	\$33.00
Service charge.....	1.21	1.23	1.23	2.01	2.04	2.05
F. H. S. insurance premium.....	1.25	1.25	1.25	2.08	2.08	2.08
Taxes—Estimated.....	6.00	6.00	6.00	10.00	10.00	10.00
Fire insurance—Estimated.....	.55	.55	.55	.85	.85	.85
	\$40.83	\$32.75	\$28.83	\$67.97	\$54.51	\$47.98

The Housing Act also provides for the insurance of mortgages upon low-cost housing projects. Thus, the use of private capital is being stimulated in the field where the PWA first endeavored to obtain its assistance, and failed. The Housing Administration already has agreed to insure mortgage loans on a number of projects in the vicinity of New York, Washington, Wilmington, Delaware, Crossett (Arkansas), Cincinnati, and Philadelphia. This division of the Federal Housing Administration is helping to solve the problem of housing that group whose income, although low, is sufficient to assure a fair return to capital invested in projects constructed under the supervision of this agency. The Reconstruction Finance Corporation is temporarily assisting in financing this type of dwelling. The RFC Mortgage Company has recently agreed to finance the first mortgage on two large projects.

Title III of the National Housing Act provides for the organization of national mortgage associations. The object of these associations is similar to that of the Federal Home Loan Bank System—to assure a proper distribution of home mortgage funds at reasonable rates and to furnish a comparatively safe security to the public from whom the funds are to be obtained. The national mortgage associations are private mortgage banks, somewhat similar to the successful *Credit Foncier* in France, which will purchase insured mortgages and issue their bonds to the public to finance such acquisitions. They must have an initial capital of at least \$2,000,000 and the restrictions placed upon their operations assure a high degree of safety to investors in the bonds. As soon as there are sufficient insured mortgages available to warrant profitable operations, it is anticipated that one or more of these institutions will be formed. They might eventually solve, in a more direct manner than other governmental agencies with the same object, the problem of protection to mortgage investing institutions in times of violent liquidation. There is an additional advantage, that the national mortgage associations purchase mortgages, thus releas-

ing cash to institutions in distress, whereas other agencies merely offer credit.

If the FHA and the various other home financing programs of the National Government create a boom in home construction, this will tend to complicate and increase the social problems of low-cost housing and slum clearance. For old dwellings are not demolished to be replaced by the new. They remain, gradually deteriorating, eventually to form dilapidated "blighted areas," often the slum areas of the cities—a source of increasing expense to the municipal taxpayer, with the threat of eventual bankruptcy to the municipality.

Moreover, these various home financing programs benefit principally the home owner as distinguished from the tenant. Approximately half our population live in their own homes and this condition has not changed materially for many years.¹⁵ For these, security of shelter is made more certain, especially in times of distress, home ownership is facilitated, and better living accommodations are made possible. But the principal housing problem is with the person of low income. It is this class which obtains least advantage from the Government lending program. The belief is growing that proper dwelling accommodations for the larger part of this class cannot be financed by private capital, because the income from this group is too small to purchase decent living accommodations at a rental sufficient to return a profit. To house this group properly there must be a contribution from society, either in the form of dwelling accommodations built at public expense and with rentals below operating costs, or by means of rental subsidies. While this is, in constitutional theory, a problem more properly within the scope of state and local authorities, the success of the National Government in similar fields, the ease of obtaining necessary funds for financing, and the wide scope of operation of the central Government, has resulted in public pressure which is forcing Congress to undertake, as far as possible within the extreme limits of the Constitution, the major burden of this social task.

There are now approximately forty governmental agencies among whose objects is the collection and dissemination of information on home economics, home construction and home financing. The important of these are the Home Economics Department, the Engineering Department and the Forestry Products Laboratory, of the Department of Agriculture; and the Bureau of Foreign and Domestic Commerce, the Bureau of Standards and the Forest Products Division, of the Department of Commerce. Although the National Government is still attempting to solve the problem of housing and unemployment through many uncoordinated channels and in various methods involving widely divergent plans, there is a growing tendency to consolidate and to cooperate. In recent months Mr. Peter Grimm has acted as a Special Assistant to the Secretary of the Treasury, investigating the various governmental housing activities in order to facilitate their coordination. Last August (1935) a Central Housing Committee was set up, composed of representatives of various governmental agencies interested in any phase of

15. See Watson, op. cit. supra note 13, at 1.

housing. This committee meets irregularly to iron out conflicts and to assure a maximum of cooperation. The principal purposes of the proposed U. S. Housing Authority is to study and determine the best procedure for carrying out a successful housing program in this country, and to unite the organizations now engaged in direct governmental housing. Some housing authorities anticipate a

new cabinet Department of Housing in the future. In the meantime, the very diversity of organization and method should result in a survival of the best, and permits a temporary wholesome competition between agencies that are, in policy, fundamentally opposed to each other in the method of solving the problems of housing and unemployment.

Legal Ethics and Professional Discipline

TENNESSEE SUPREME COURT APPOINTS COMMITTEE ON REGULATION OF LAW PRACTICE

ACTING upon the petition signed by many members of the Tennessee bar, as a result of a movement for which members of the junior bar were largely responsible, the Supreme Court of that state appointed a committee on July 3, 1936, to investigate the need for further regulation of the practice of law to the end that unethical conduct and unauthorized practice may be controlled. The Tennessee Bar Association and several local associations had endorsed the filing of the petition which resulted in a decree that an investigation and report be made of the feasibility of additional rules by the court regarding admission to the bar and regarding the practice of law. The distinguished committee appointed by the court includes William L. Frierson, Chattanooga, former Solicitor-General of the United States; H. D. Minor, Memphis; E. W. Ross, Savannah; W. E. Norvell, Nashville; H. B. McGinnis, Carthage; Judge R. A. Davis, Athens; and Harley G. Fowler, Knoxville.

In the petition the court's attention was called to the existence of widespread unlawful practice of law by unlicensed persons and with the aid of certain attorneys in some instances. It was suggested that the court had inherent power to promulgate rules for the regulation of the practice of law and to formulate standards of ethics for the profession and to see that such standards were adhered to. The Rules of the Supreme Court of Missouri were filed as a part of the petition, with the comment that "it is well known in professional circles that such plan [Missouri's] has been effective in suppressing unethical and illegal practice in that state." The court was requested to appoint a commission to investigate and report on means of regulating the practice of law in Tennessee, using the Missouri Plan or disregarding it and submitting one of its own with similar objectives.

In the brief supporting the petition it was urged that the court had inherent power to regulate the practice of law, and that this power was not restricted by reason of statutory enactments relative to the conduct of attorneys. This inherent power carried with it, the brief declared, an implied power to punish those who attempt to practice law without first obtaining a license.

ATTORNEY MUST ACT IN GOOD FAITH OR CONTINGENT FEE CONTRACT WILL BE INVALID

A contract upon a contingent fee basis between attorney and client must be made in good faith, without

suppression or reserve of fact, and without undue influence in order to be valid. This principle was enunciated by the Supreme Court of Oklahoma in its decision in the case of *McArthur v. Lotridge*, rendered June 2, 1936 (58 P. (2d) 326).

McArthur, an attorney, had secured from one Irene Stewart a contract to prosecute upon a contingent fee basis a cause of action against Lotridge some two days after Miss Stewart had entered into a similar contract with a firm of Tulsa attorneys involving the same cause of action. McArthur filed suit on the claim by Miss Stewart, and gave notice he was claiming an attorney's lien. Shortly thereafter Miss Stewart, with the assistance of an attorney from the firm with which she had first contracted, dismissed the suit, advised McArthur thereof, and discharged him. Miss Stewart's claim was prosecuted to judgment by the attorneys with whom she had first contracted. McArthur then filed a motion in the case which he had instituted asking that the cause be reinstated and that his attorney's fee be determined and allowed against Lotridge. The trial court denied the motion and the appeal was taken upon which the Supreme Court rendered its decision.

The court points out that the trial court's decision will not be reversed unless it is against the clear weight of the evidence, and observes:

"While the present action is not one between attorney and client, certain rules of law arising from that relationship must govern in the disposition of this appeal. If movant [McArthur] was actuated by bad faith toward Miss Stewart in procuring the contract with her, she was then justified in discharging him as her attorney. His authority as such attorney would thereupon cease and his lien claim upon her cause of action fail. A contract between attorney and client providing for a fee upon a contingent basis is not binding unless entered into in good faith. . . . In the Thurman Case the rule is stated as follows: 'A contract between attorney and client upon a contingent basis, to be binding, must be made in good faith without suppression or reserve of fact and without undue influence, and the compensation bargained for must be just and fair.'

"The evidence on the question of the bad faith of movant is conflicting. Miss Stewart, appearing as a witness for respondent, testified that, at the time of the execution of the contract with movant, she informed him of her contract with the other firm of attorneys; that movant induced her to sign the contract by assuring her that the other lawyers were charging her an exorbitant fee, and that said lawyers were inexperienced and unable to properly represent her and that he was able to secure better and quicker results, and that she would be under no further obligation to said attorneys by reason of their contract. Movant, as a witness in his own behalf, specifically denied all the foregoing testimony. This and the

undisputed facts heretofore related, constitute the material evidence in the case.

"The evidence of the respondent is sufficient to establish bad faith on the part of movant in his transaction with Miss Stewart. As shown by her testimony, the movant accepted his contract of employment in total disregard of the client's duties and obligations to Shea & Trower. That firm already held an interest in the client's cause of action which could not be extinguished without just cause. Movant, according to respondent's evidence, knew of this interest. He is charged with the knowledge that the claim of Shea & Trower would, or could, present serious difficulties to the client if movant's own contract should be allowed to stand. These facts standing alone are sufficient to constitute bad faith on the part of movant to furnish the client justifiable cause for dismissal of the action filed by him and his dismissal as counsel."

FORMER MUNICIPAL COURT JUDGE DISBARRED IN NEW YORK

The Appellate Division of the Supreme Court in New York City disbarred Harold L. Kunstler, a former Municipal Court Justice, on June 30, 1936. Kunstler resigned from his place on the bench in 1934 just prior to the time when a referee who had heard charges against him was going to recommend his removal, according to the *New York Times*. The disbarment was on practically the same charges which were brought for his removal from the bench. The court points out that the cumulative effect of the charges against him establish his "absolute unfitness to be a member of the bar."

The evidence relied upon by the court shows an attempt on the part of the respondent to defeat a judgment entered against him by having another one entered and the latter entered as the first claim for his salary. The second judgment was not bona fide in the court's opinion. Reference is also made to the untruthful statements with reference to outstanding obligations which respondent made when applying for loans. Respondents' income from March, 1928 to October, 1931, as a judge was some \$40,000. During the same period he deposited (apart from proceeds of loans) some \$166,000.

The court says:

"The very great difference between his salary and the total of his deposits, in the absence at least of plausible explanation, justifies the inference that he had an undisclosed source of income and the evidence and the general evasive character of the respondent's testimony in connection with this group of charges indicates his heedlessness of the oath, to testify truthfully."

FALSE AFFIDAVIT IN MOTION TO DISMISS AN APPEAL LEADS TO ATTORNEY'S SUSPENSION

In securing a dismissal of appeal by an affidavit known to be false, an attorney is guilty of unethical conduct meriting suspension from practice. *In re Finkel*, 288 N. Y. S. 409 (May 29, 1936).

In this case disciplinary proceedings were instituted by the Association of the Bar of the City of New York against respondent attorney and he was suspended for one year. Respondent had moved to dismiss an appeal from a judgment in favor of his client and in his affidavit in support of the motion he stated that the appellant had done nothing to bring the case on for argument and had failed to file the necessary

papers. It so happened that the attorney for the appellant in the case had filed a notice of appeal, prepared the case on appeal and purchased the stenographer's minutes of the trial, which he had sent to the respondent. Respondent had turned these minutes over to a third party who had lost them. In addition respondent knew that the appellant's attorney had made continued efforts for several months to obtain a return of the minutes, and for much of that period he was not informed that they were lost. Such conduct is improper, the court holds.

"The entire record supports the finding of the referee that the conduct of the respondent was highly reprehensible and the charges in the petition fully established. Sharp practice such as here disclosed is so harmful to the reputation of the bar that we must endeavor to stamp it out by disciplining all attorneys guilty of such conduct."

Acceptance of the finding of fact of the Board of Governors of the State Bar leaves the court free to enter such disciplinary order as it deems proper the Supreme Court of Oklahoma points out in the case of *In re Williams*, 58 P. (2d) 145. The court's syllabus on the point is as follows:

"In reviewing the action of the board of governors of the state bar in a cause wherein a member of the bar disciplinary order as is warranted by the facts and deemed is charged with misconduct constituting a ground for disciplinary action, the Supreme Court will examine the record, and when the finding of the guilt of the respondent is approved, the court will determine and make such disposition under the circumstances of the case."

Organization of Federal Communications Bar Association

Following the example of the Interstate Commerce Commission practitioners, who have an established and successful association, lawyers practicing before the Federal Communications Commission have created a Federal Communications Bar Association. The formal organization was consummated at a dinner and meeting held on June 17, 1936, in Washington, D. C. Approximately seventy-five lawyers attended and communications were received from many lawyers located in other states, expressing approval of the project and giving assurances of their cooperation.

After considerable discussion, a constitution and by-laws, adapted from those governing the Interstate Commerce Commission association, were adopted. Officers for the first year were elected as follows: Louis G. Caldwell, Washington, D. C., President; Ralph H. Kimball, New York City, Vice President; and George O. Sutton, Washington, D. C., Secretary-Treasurer. These three officers are ex officio members of an Executive Committee of nine. The other six members were elected as follows: Duke M. Patrick and Frank D. Scott, both of Washington, D. C., for three years; Frank Quigley, New York City, and Paul D. P. Spearman, Washington, D. C., for two years; and Ben S. Fisher and Phillip J. Hennessey, Jr., Washington, D. C., for one year.

WILLIAM PINKNEY, LEGAL PEDANT

By MONROE JOHNSON

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ON a chill February day in the year 1822, the eccentric, but eloquent, John Randolph of Roanoke, clad, as was his wont, in hunting attire, booted and spurred, with cap and riding whip thrown carelessly across his desk, arose from his seat in the House of Representatives and said in his high-pitched, yet pleasing voice:

"I rise to announce to the House the not unlooked for death of a man who filled the first place, in the public estimation, in the first profession in that estimation, in this or in any other country. We have been talking of General Jackson and a greater than he is not here, but gone forever. I allude, sir, to the boast of Maryland and the pride of the United States—the pride of us all, but more particularly the pride and ornament of the profession of which you, Mr. Speaker, are a member and an eminent one. I will not say that our loss is irreparable, because such a man has existed and may exist again. There has been a Homer; there has been a Shakespeare; there has been a Newton; there may be a Pinkney, but there is none now."

Who was this Pinkney, that his passing should have brought forth such a eulogy from the vitriolic Virginian, more noted for caustic criticism than fulsome praise?

William Pinkney, was born at Annapolis on March 17, 1764. His father, a Tory, was a prosperous resident of that place. However, the confiscation of his property, at the outbreak of the Revolution, because of his political principles, necessitated the withdrawal of the son, aged thirteen, from King William's School (now St. John's College) where he had begun his education. Jonathan Pinkney, despite his Toryism, was regarded by his Whig neighbors as "a man of the highest probity and character." William does not appear to have shared his parent's politics. And it is related that, as a boy, he often eluded the vigilance of his father in order to mount guard with the Continental soldiers in the fort which protected the town.

Annapolis was then in its heyday as a center of colonial culture. Indeed, at that time, it was frequently referred to as "the Athens of America." Here many of the wealthy Maryland "tobacco barons" maintained town houses for their convenience in attending the courts and the sessions of the colonial assembly, as well as the theatre, the races, and the brilliant balls. The importance of "the golden weed" in the life of the province at this period may be seen from the fact that, for a time, tobacco served as the currency of the colony. Later Charles Carroll of Carrollton turned the tide from tobacco to wheat by making the latter the chief crop of his vast domain, thereby changing the course of Maryland history.

Pinkney imbibed the culture of his early surroundings in Annapolis and by a lifetime of intensive study overcame the handicap of his deficient classical education. In 1786, he was admitted to the bar after completing a course of study in the office of the celebrated Samuel Chase, who had

been one of the Maryland signers of the Declaration of Independence. Chase was a bitter partisan whose "bacon face," as it was described by the Democrats, was no less obnoxious to the Jeffersonians than were his Federalist philippics from the bench, which finally resulted in his impeachment. Chase's subsequent acquittal was largely due to the able arguments in his defense presented by Luther Martin, that "Federal bulldog" whom Pinkney was destined to succeed as the leader of the Maryland bar.

Pinkney's early success at the bar resulted in his election as a delegate to the Maryland convention of 1788 which ratified the Federal Constitution. He, however, voted against ratification, as did his mentor, Samuel Chase, who had not yet become an arch-exponent of Federalism. Pinkney's action in this respect is interesting in the light of his later preeminence as a constitutional lawyer.

From 1788 to 1792, and again in 1795 Pinkney was a member of the Maryland Legislature. His advanced views at this period of his career are illustrated by two incidents, both worthy of note. It is of record that he vigorously voiced his opposition to a State statute, then in effect, prohibiting the voluntary emancipation of slaves by their owners—a method of solving the slavery question, incidentally, which was later adopted by many prominent Marylanders, including Francis Scott Key and Chief Justice Roger B. Taney, who freed his own slaves several decades before the much misquoted Dred Scott decision was rendered. Pinkney also unsuccessfully sought to remove the civil disabilities of the Jews, who were at that time barred from holding public office in Maryland. Despite the tradition of tolerance inherited from the Calverts, this injustice to the Jew was not ended, strange to say, until 1826.

In 1790, Pinkney had been elected to Congress. However, his eligibility was questioned on the ground that he did not reside in the district from which he was elected. After stubbornly contesting the point, Pinkney secured his seat and then capriciously refused to serve. Meanwhile his rise at the bar had been remarkable.

President Washington, in 1796, appointed Pinkney one of the two commissioners at London to adjust American claims against Great Britain, under the Jay Treaty, for maritime losses and English claims against the United States arising from confiscations during the Revolution. This highly important assignment kept him in London for eight years. Here Pinkney spent his spare time profitably by attending the courts of law and listening to the debates in Parliament, which afforded him an excellent opportunity to study the forensic styles of such English orators as Burke, Pitt, Sheridan and Fox. Ever an assiduous student, he also read widely in both law and literature.

While in London, Pinkney successfully terminated an old chancery suit started more than a

decade before, recovering for the State of Maryland a large amount of stock in the Bank of England. Hence his prestige had been greatly enhanced in his native State, despite his long absence, when he resumed practice in Baltimore in 1804. Soon after his return from abroad, he became Attorney-General of Maryland, but resigned after a brief period.

Again in 1806, Pinkney was sent to London, this time by President Jefferson, as joint commissioner with James Monroe, then American Minister at the Court of St. James, to negotiate with Great Britain regarding the seizure of neutral ships in time of war. Upon Monroe's return to America, in 1807, Pinkney succeeded him as Minister at London and served at this important post during the trying times preceding the War of 1812. Although Pinkney's valiant efforts to maintain by peaceful means the dignity of the young republic were in vain, no less an authority than Henry Adams declared that "America never sent an abler representative to the Court of London."

Returning home, in 1811, Pinkney was elected to the Maryland Senate. However, he resigned, in 1812, to enter President Madison's Cabinet as Attorney-General. By this time he had assumed the undisputed leadership of the American bar, which position he maintained until his death. After drafting the declaration of war, Pinkney continued as Madison's chief legal adviser during the greater part of the War of 1812. Although he resumed his practice in Baltimore, in 1814, he, nevertheless, vigorously supported the war with his pen. Not content with that, Pinkney also commanded a battalion of Maryland riflemen in defense of Washington. And he was severely wounded at Bladensburg, a battle which was facetiously referred to by the Federalists, who had never liked the war anyhow, as "The Bladensburg Races," the American militia having been routed by a numerically inferior force of British, who then proceeded to burn the Capitol and White House.

In 1816, Pinkney came to Congress. He was then in the very fulness of his fame, with the background of a national reputation and ranking as a great constitutional lawyer. Consequently, he felt entirely competent to speak *ex cathedra* on such a subject as the treaty making power, a question involving both constitutional law and diplomatic usage, when the occasion arose. This was too much for the pride of the redoubtable John Randolph of Roanoke, a master of irony and invective, within whose veins the blood of the aristocratic Randolphs was blended with that of the savage Powhatan. The veteran Virginian legislator, who had served for twenty years in the House, resented the superior attitude of the new member and thought to put the upstart in his place. Rising to rebuke the presumptuous Pinkney, Randolph replied to the latter's remarks, referring to him in the customary manner as "the member from Maryland." Then pausing, as if not quite certain, he added, "I believe he is from Maryland." The implied doubt as to whence the new Congressman came, in the light of his well known reputation as a diplomat and a leader of the American bar, amused even Pinkney, despite his inordinate vanity. Gravely walking over to Randolph's seat, he introduced himself and assured the sarcastic statesman that he was "from Maryland."

Resigning from the House of Representatives

after a brief period of service, Pinkney accepted an appointment as Minister to Russia, with a special diplomatic mission to Naples *en route*. Although he failed in his attempt to negotiate a commercial treaty with the government of the Czar, the primary object of his appointment, he succeeded in establishing more friendly relations with Russia than had theretofore existed.

Soon after his return from abroad, in 1818, Pinkney was elected to the Senate, in which he served until his death. Here, he was an outstanding figure, in the role of an interpreter of the Constitution. During the celebrated debates over the Missouri question, Pinkney, because of his constitutional views, became a strong champion of the cause of the slave-holding South. When charged with inconsistency by his opponents, because of his earlier advocacy of emancipation, he explained that he was no defender of slavery in the abstract and still favored the gradual emancipation of the slaves by their owners—views, by the way, held by no less a Southerner than Robert E. Lee, who indicted the "peculiar institution" as "a moral and political evil" and drew his sword solely in defense of State sovereignty. Pinkney's speeches in reply to Rufus King, who presented the Northern viewpoint, were an important factor in the creation of the Missouri Compromise, which, temporarily at least, abated the agitation of the all-absorbing slavery issue that, in the words of Jefferson, alarmed the country "like a firebell in the night." The noted Thomas Hart Benton, a contemporary Senator, said that Pinkney was the greatest orator of his day, but correctly prophesied that posterity would not so regard him, as "he spoke more to the hearer than the reader."

Aside from Pinkney's brilliant services in the Senate, his most distinguished legal labors were performed, during this period of his career, in the Supreme Court of the United States. Before that august tribunal his crowning achievements were his arguments in the celebrated cases of *McCulloch v. Maryland* and *Cohens v. Virginia*.

The decision in *McCulloch v. Maryland*, in 1819, was of outstanding importance in the development of American constitutional law. The immediate question involved was whether the State of Maryland had the power to tax a national bank; but the basic issue was the supremacy of the Federal government as against the dominance of the States. Pinkney appeared as senior counsel for the bank. Associated with him were Daniel Webster and William Wirt. It is interesting to note that both Pinkney and Wirt were natives of Maryland—the litigant which they were opposing. Maryland was represented by her Attorney-General, Luther Martin, who, despite his years and a half century of excessive drinking, delivered an able, though losing argument. Pinkney's speech consumed three days. Regarding his argument, it suffices to quote Beveridge, the biographer of Chief Justice Marshall, who says, "To reproduce his address is to set out in advance the opinion of John Marshall, stripped of Pinkney's rhetoric, which, in that day, was deemed to be the perfection of eloquence." Never was contrast more striking than between the opposing attorneys, Pinkney and Martin, the rising and setting suns among the legal luminaries of Maryland. Whereas Martin was slovenly in dress, manners and diction, Pinkney was meticulous in all three. Indeed, Chief Justice Taney is quoted as

saying that he had frequently seen the fastidious Pinkney writhe, as if in pain, while listening to Martin utter such vulgarisms as *colch* and *sol*, in which the latter seemed to delight. These antagonists differed, too, in methods of attack, the pedantic Pinkney thrusting as with a rapier, while the crimson-faced Martin wielded a battle-ax.

The case of *Cohens v. Virginia*, decided in 1821, was also of vital importance. Here the question at issue was whether the Supreme Court of the United States could take cases on appeal from the State courts and thus make itself the final tribunal as regards constitutional questions. Pinkney again had the opportunity to champion the cause of Nationalism, appearing as the principal counsel for the Cohens. And again he triumphed.

Physically, Pinkney is described at this period as being conspicuous for his square shoulders, erect carriage and intense blue eyes. His face was deeply furrowed, with heavy circles under the eyes, which he concealed, however, by the use of cosmetics. This singular character also wore a corset to confine his too ample figure. In manner he was haughty and reserved, with little sense of humor. Pinkney pompously assumed an overbearing attitude toward his colleagues at the bar, especially if they were rivals. Indeed, a friend once stated that he had never heard Pinkney admit that anyone was his superior in anything. Always attired in the newest fashion, he habitually wore white gloves in court. Fastidiously correct in speech, his manners were also polished, though overdressed like his person. But if the pedantic Pinkney was affected and overbearing, he was also eloquent, logical and learned. For the affected fop was a profound lawyer, as able as he was insolent. His voice, however, is described as harsh and unmusical.

While Pinkney was at the height of his fame, his foppish dress and extravagant rhetoric, together with his meticulous manners, proved to be a potent lure for the ladies, who crowded the courts to hear him speak. And, indeed, Pinkney, ever the actor, sought their approbation as much as that of bench and bar.

It is reliably related that Pinkney, on one occasion, had just concluded an argument before the Supreme Court. As he was about to take his seat, Dolly Madison, accompanied by a bevy of Washington belles, entered the court room. Pinkney, thereupon, asked and obtained leave of the court to repeat his argument, again covering the same ground but using less logic and more eloquence.

The same authority states that, at another time, Pinkney expressly recognized the presence of the feminine part of his audience by saying that he would not weary the court by going through a long list of cases to prove his point, as it would not only be fatiguing to the Justices but inimical to the laws of good taste, which, on that occasion, (bowing low to the ladies) he particularly wished to obey.

No less an authority than Justice Story has recorded that Pinkney's eloquence before the Supreme Court frequently kept the belles of the city "entranced for hours."

Pinkney, indeed, literally lived for applause. His excessive vanity caused him to attempt to create the impression that his legal learning was the result merely of hasty incursions among the authorities and that his citation of cases, made in an

offhand manner, was based only on chance recollection; whereas, in fact, he never went into a case without the most careful and elaborate preparation.

As an example of Pinkney's affectation, Daniel Webster was fond of relating an anecdote regarding an important case in which these two great lawyers were associated. While an opposing attorney was arguing the case, Webster whispered to Pinkney that Blackstone stated to the contrary regarding the point involved. Pinkney at once asked if Webster could find the reference. Webster, thereupon, produced a marked copy of Blackstone's *Commentaries*, which Pinkney eagerly studied. When the latter arose to answer his opponent's argument, he asserted that Blackstone at *about* a certain page—giving, however, the exact page—stated, to the best of his recollection, the passage which he then proceeded to quote *verbatim*, having just committed it to memory, although pretending to draw it from the recesses of his mind.

Toward those who challenged his supremacy at the bar Pinkney's attitude was insolent and ungenerous. And, on one occasion, a duel was narrowly averted between him and his fellow Marylander, William Wirt, an able and eloquent advocate who complained that Pinkney had acquired "a sort of papal infallibility." Wirt, despite his humble origin as the son of the Bladensburg tavernkeeper, is characterized in a contemporary account as "the most polished gentleman in America"—a description which did not add to his popularity with Pinkney.

One instance of Pinkney's insolence culminated in a clash with Webster—with disastrous results to the former. While these two legal giants were opposing each other before the Supreme Court, Pinkney made some disparaging remarks regarding Webster's ability as an attorney. After adjournment, Pinkney, throwing his cloak over his arm, superciliously sauntered out of the court room. Webster followed and said that he wished to speak with Pinkney privately. Leading the way to an anteroom, Webster locked the door and, under threat of a thrashing, extracted from Pinkney a promise to apologize in court the next day. Although the Maryland dandy, encased in his corset, may have feared to match his pugilistic prowess with that of the doughty Daniel, nevertheless he was no coward. And it should be remembered that he had bravely stopped a British bullet at Bladensburg. Then, too, Pinkney well knew that Webster would have refused satisfaction if challenged in accordance with the code duello; for he had publicly stated, "I have always trusted to my strong arms and do not believe in pistols." And, in fact, duelling never prevailed in New England, as an approved method of settling disputes, to the same extent as south of the Mason and Dixon Line.

Pinkney is credited with the most extensive and lucrative practice of any lawyer of his time. And his supremacy at the bar is amply attested by his contemporaries. John Marshall ranked him as "the greatest man I ever saw in a court of justice." Roger B. Taney wrote, "I have heard almost all the great advocates of the United States, both of the past and present generation, but I have seen none equal to Pinkney." In this connection it should be recalled that Marshall and Taney, together, presided over the Supreme Court for more

than half a century, during which time they listened to such learned and eloquent lawyers as Daniel Webster, Luther Martin, Rufus Choate, Henry Clay, Jeremiah Mason and William Wirt.

Pinkney died, while yet at the height of his

career, on February 25, 1822, as the result of exhaustion brought on by his legal and legislative labors. Unfortunately for his fame, he did not commit his speeches to writing. Consequently, he has been almost forgotten by succeeding generations.

PROCEDURAL IMPROVEMENTS AND THE RULE-MAKING POWER OF OUR COURTS

By CARL WHEATON

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FROM time to time in past years, articles, some of which will be cited later on in this paper, have been written suggesting that procedural rules be made by our courts. Moreover, many state legislatures have enacted statutes dealing with this matter.

Although it is difficult properly to classify some of these, an attempt will here be made to group them. First, there is a comparatively long list of enactments providing that state courts may make rules to govern *their own practice* if those rules are not contrary to statutes or rules of higher courts.¹

Then, there are laws providing that superior courts may make rules for lower courts, but the rules must not be inconsistent with statutes of the state.² At least two states have statutes which probably mean the same thing, as they provide that the superior courts may make rules necessary to proceedings under the provisions of a procedural statute. Finally, there are enactments which appear to grant upper courts the power to make rules of practice for proceedings in lower courts without making it necessary that those rules be consistent with state statutes. They fail, however, specifically to state that the rules shall supersede statutes.³ But there is no doubt that the effect of some enact-

ments is to make rules effective as against statutes. Thus, a section of the Colorado laws states, "The Supreme court shall prescribe rules of practice and procedure in all courts of record, and may change or rescind the same; . . . Such rules shall supersede any statute in conflict therewith. . . ." Statutes clearly having the same effect are found in Delaware (perhaps), Washington, West Virginia, and Wisconsin.⁴

Thus, we can see that numerous states have considered the problem of court rules. But most of the laws merely provide that courts may make rules for their own proceedings. This means nothing, as they have admittedly had this power for centuries.⁵ The interesting statutes are those which allow superior courts to make rules for proceedings in lower tribunals. It appears certain that these laws are based upon the philosophy that prior legislative permission must be obtained before such rules are effective. The thought seems to be that the power to make procedural rules rests only with lawmaking bodies. Even those enactments which state that rules shall abrogate statutes are, apparently, founded upon the idea that legislative authority must be the basis of rules of court.

It is, then, true that something has been done to give to our superior courts the power to make procedural rules governing all courts. One of the latest examples of this is the action of Congress in giving the federal Supreme Court the authority to make combined or uncombined rules of procedure in equity and law cases, with the power of Congress to reject combined rules.⁷ But no consistent national campaign has existed to give upper courts this power, or to get them to assume such authority without legislative sanction.

Should such a national campaign be undertaken? The answer to this query is necessarily determined by the answer to another question. Which type of rules, legislative or court, will give us the better procedure? There is also a subsidiary inquiry which must be made.

1. Typical statutes of this kind are Ill. Rev. Stats., ch. 110, par. 130; La. Code of Prac. (Dart, 1932) secs. 145, 1412; Rev. Stats. of Me. (1930) ch. 91, sec. 16; Ann. Laws of Mass. (1933) ch. 213, sec. 3; Mason's Minn. Stats. (1927) secs. 133, 174, 182, 228, 1936 Supp. sec. 8992-11; Miss. Code (1930) secs. 749, 3377; Rev. Codes of Mont. (1921) sec. 8845; N. M. Stats. Ann. (1929) sec. 105-2525; McKinney's Consol. Laws of N. Y. Ann. (1917) Judiciary Law sec. 51; N. D. Comp. Laws (1913) sec. 7342; Throckmorton's Ann. Code of Ohio (Baldwin's 1934 revision) secs. 1473, 1522, 1556, 1558, 4557, 4575, 10501-13; Penn. Stats. (Purdon's 1936 Compact ed.) Title 17, secs. 361, 2076, Title 20, sec. 2271; Gen. Laws of R. I. (1923) secs. 4651, 5059; Code of Laws of S. C. (1932) secs. 904, 905; Comp. Laws of S. D. (1929) sec. 5133; Michie's Tenn. Code (1932) secs. 9928, 9931, 10,330; Rev. Stats. of Utah (1933) secs. 20-2-4, 20-7-4; Public Laws of Vt. (1933) sec. 1244; Va. Code of 1930, sec. 3108; Remington's Rev. Stats. of Wash. (1933) sec. 13-3; Acts of W. Va. Legislature (1935) p. 170; Wis. Stats. (1933) sec. 251-11; Wyo. Rev. Stats. (1931) sec. 31-107.

2. The following are examples of this type of statute. Kan. Rev. Stats. (1923) sec. 60-3825; Ann. Code of Md. (Flack, 1935 Supp.) Art. 26, sec. 35A; Comp. Laws of Mich. (1929) sec. 13540; Rev. Codes of Mont. (1921) sec. 8845; Const. of Neb. Art. 5, sec. 25; Nev. Comp. Laws (1929) sec. 8377; N. J. Comp. Stats. (1910) secs. 253 and 254, p. 4128; Comp. Laws of S. D. (1929) sec. 5134; N. Car. Code of 1931, Ann. sec. 1421; Vernon's Ann. Tex. Stats., sec. 1731.

3. Rev. Code Ariz. (1928) sec. 3652; Comp. Gen. Laws of Fla. (1927) sec. 4682 (4); 1913-1925 Supp. to Compiled Laws of N. D. (1913) sec. 769a 6; Throckmorton's Ann. Code of Ohio (Baldwin's 1934 revision) sec. 10501-13; Baldwin's Ohio Code Service (1936) sec. 12223-47; Okla. Stats. (1931) sec. 23; Penn. Stats. (Purdon's 1936 Compact ed.) Title 17, sec. 2071; Va. Code of 1930, secs. 5960 and 5960a.

4. Courtright's Mills Ann. Code of Colo. (1933) sec. 460.

5. Rev. Code of Del. (1915) sec. 3688; Laws of N. M. (1933) p. 147; Laws of R. I. (1930) p. 444 (in effect); Remington's Rev. Stats. of Wash. (1932) secs. 13-1 and 13-2; Acts of West Virginia Legislature (1935) p. 170; Wis. Stats. (1933) sec. 251.18.

6. Smith v. State ex rel. Hamill, 137 Ind. 198, 140 Ind. 340, 36 N. E. 708 (1894); Epstein v. State, 190 Ind. 693, 128 N. E. 353 (1920); Fox v. Conway Fire Ins. Co., 53 Me. 107 (1865); State ex rel. Kansas City Power & Light Co. v. Trimble, 291 Mo. 532, 237 S. W. 1021 (1922); Harres v. Commonwealth, 35 Pa. 416 (1860); Russell v. Archer, 76 Pa. 473 (1874); In re Evans, 42 Utah 282, 130 Pac. 217 (1913); Campbell v. Union Savings & Investment Co., 63 Utah 366, 226 Pac. 190 (1924).

7. 28 U. S. C. secs. 723b and 723c.

Should the legislatures be urged to grant permission to courts to make these rules, or should the courts be requested forthwith to claim the rule-making power without any aid from legislatures?

The thesis of this writer is that, if it is legally possible, a nation-wide effort should be made to get our courts, without legislative assistance, to assert their power to make procedural rules governing trials and appeals. By this method we shall obtain a much finer procedural system than will result from legislative rules.

First, have higher courts the power and right to make rules of procedure for lower courts? Both judicial and non-judicial writers have so asserted. It has been said definitely by judges that the power to make rules governing practice and procedure in the courts is judicial, not legislative.⁸ Among non-judicial writers who have dealt with this matter, Abraham Gertner of the Columbus, Ohio bar has written in a report to the Judicial Council of Ohio, "If a court has inherent power to make rules, the mere fact that the legislature has acted upon the same subject should make no difference. A legislature cannot destroy the inherent power of a court by passing an act regulating a matter with which a court has dealt by rule. If the court had the power before the statutory regulation, it also has it afterwards, and the statute should be held void."⁹ Roscoe Pound has declared that from an historical viewpoint courts have regularly exercised a power of regulation of judicial procedure by rules of court, and that for centuries prior to the adoption of American constitutions the power to make rules governing procedure of lower courts, as well as of their own, was in the King's courts at Westminster. This power, he asserts, was inherited from England, and was recognized by courts in this country.¹⁰ John H. Wigmore says, "We assert that the legislature (federal or state) exceeds its constitutional power when it attempts to impose upon the judiciary any rules for the dispatch of the judiciary's duties; and that therefore all legislatively declared rules of procedure, civil or criminal, in the courts, are void, except such as are expressly stated in the Constitution. This is true logically under the constitutional provision that the powers of government are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as expressly directed and permitted."¹¹ The superintending power of superior over lower courts has been given as a reason for permitting the former to make rules of practice for the latter.¹² This seems to be a valid reason, and should be available in all states.

Logically, courts should have the authority to do what is necessary to carry on their own business. This includes making procedural rules. It is only by courtesy

or constitutional provisions that legislatures can make such rules. Therefore, if a more excellent legal procedure will result from court, rather than from legislative, rules, the proper mode of attack upon our problem is to attempt to have the courts make our practice rules without asking the legislatures to grant them the privilege. If such permission is requested of legislatures on the basis that theirs is the privilege to grant it, one immediately surrenders to the legislatures. Even though, after strenuous efforts, they could be brought to give supreme courts the right to make rules of court for lower tribunals, the legislatures might at any time reverse their decisions, and deny such courts the suggested power.

Let us now examine the question whether or not better procedural rules will result if courts, rather than legislatures, make those rules.

Procedural rules need to be easily changed. The reason for this is that, if a rule does not turn out to be just what is wanted, the courts should not be bound to continue to use it, but should be able to make the change that experience proves is necessary. Everyone knows that legislatures do not readily change rules of practice. There are many very practical reasons for this. Legislatures are in session but a small part of the time, and they are primarily interested in other things when they do meet. Courts are at work most of the time, and are vitally interested in procedural rules. They have the opportunity and will to improve their procedure; the legislatures lack both the time and interest to attend to procedural changes.

But presume that some few members of a legislature are interested in this matter; presume, further, that these legislators are able procedural lawyers, and draw their bills with care. What may happen to these bills when they reach the floor of the legislature? Their enemies, lawyers who like the old, imperfect rules, because they give these foes the power improperly to protect wrongdoers, will either stop the passage of the bills or will mutilate them so by amendment that little or no progress is made if they are passed.

Again, it is common knowledge that the majority of members of a legislature may not be lawyers. How can these people properly pass upon the value of rules of practice? Compare their ability in this matter with that of members of superior courts. Moreover, this lack of information, it has been suggested,¹³ leads legislators who are not lawyers to hesitate to pass statutes making important procedural changes. They are inclined to leave the subject alone or busy themselves with meddlesome changes in minor bills which can be easily passed with little debate.

It is also well known that legislators are politically minded. They do not hesitate to play politics in relation to bills dealing with rules of practice. Trading of votes wherein procedural statutes are involved can scarcely lead to improvements in practice.

Can there be need for a further showing that courts, aided, if need be, by experts in procedural law, and not legislatures, should make our rules of practice? Definitely, no.

That being true, why should we wait longer to start a nationwide campaign to encourage our supreme courts to reassert their rule-making power over proceedings in all courts, granting, of course, to lower tribunals the right to pass rules essential to their peculiar

8. *Hanna v. Mitchell*, 202 App. Div. 504, 196 N. Y. Supp. 43 (1st Dept. 1922). See to the same general effect *Houston v. Williams*, 13 Cal. 24 (1859); *Ackerman v. Ackerman*, 123 App. Div. 750, 108 N. Y. Supp. 534 (2nd Dept., 1908); *Cooper v. Board of Com'rs of Franklin Co.*, 184 N. C. 615, 113 S. E. 569 (1922).

9. *The Inherent Power of Courts to Make Rules* (1936) 10 U. of Cin. L. Rev. 32.

10. *The Rule-Making Power of the Courts* (1926) 12 A. B. A. J. 599; *Senator Walsh on Rule-Making Power on Law Side of Federal Practice* (1927) 13 A. B. A. J. 84.

11. *All Legislative Rules for Judiciary Procedure Are Void Constitutionally* (1928) 23 Ill. L. R. 276.

12. *Kolkman v. People*, 89 Colo. 8, 300 Pac. 575 (1931); *Hudson, The Proposed Regulation of Missouri Procedure by Rules of Court* (1916) 17 U. of Mo. Bull. Law Series 13, 3.

13. *Sunderland, The Exercise of the Rule-Making Power* (1926) 12 A. B. A. J. 548.

situations? We should hesitate no longer. Spasmodic efforts along this line should be replaced by a definite, continuous, helpful program.

How are we to proceed? First, the people of this country should be aroused to the necessity of this effort. They must be taught to understand that it is to their great benefit that the procedural law of this country should be the best that erring men can produce. It is essential that the nation as a whole be aroused, for it is possible that courts will want the support of laymen, as well as lawyers, if they are to ignore legislatures. That means that wide publicity should be given to this movement. Not only must lawyers and legal magazines, national and local, sponsor it, but laymen and non-legal papers and periodicals must support it.

A national organization with local subsidiaries

should be created. Laymen, as well as lawyers, should be among its numbers. They should serve without remuneration. If intelligently managed, the expense of carrying on the work of such a body should not be difficult to raise.

It seems that here is an opportunity for the lawyers of our country to prove to their countrymen, as they never have been able to before, that theirs is the desire to give to us all the best legal system that man with his present knowledge and ability can devise. Never has the writer doubted that the legal profession has, as a whole, had any lower ambition than this, but the general public has felt otherwise. Let us prove to our entire country in no uncertain manner that ours is a profession with the noblest of purposes, to serve mankind.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE *Soul of George Washington: an Overlooked Side of His Character*, by Joseph Buffington, Senior United States Circuit Judge, Third Circuit. Philadelphia: Dorrance and Company. 1936. Pp. 173. —This highly intimate and personal approach to the spiritual life of George Washington seems to call for a correspondingly personal review. First, I must say that the rather tasteless reprint on the jacket, of Washington in prayer at Valley Forge, was not calculated to appeal to the present reviewer. Nor did a casual opening to a few detached pages overcome an initial prejudice against the little volume. But a detailed, verbatim reading proved a revelation.

The writer in an apparently naïve and artless fashion took the reader into his confidence and shared his research with him as a personal experience for both. Indeed, the unaffectedly amateurish character of the work proved one of its attractions. The author is riding a hobby. He is untroubled by apparatus and yet he has the lawyer's feeling for evidence and the craftsman's skill in building up a case. He had a thoroughly good time in writing the book and he shares that good time very generously with the reader.

He is so entirely convinced himself of the genuine piety of Washington that he sometimes adduces in evidence formal and perfunctory expressions of devoutness no more convincing than the pious professions of a state paper or even the rigid formula of the opening clauses in a will. But he has combed the writings of George Washington for allusions to Providence and for faith and gratitude toward God, and the cumulative effect, it must be said, is very striking.

The reviewer voices humble testimony to the effect which the author has achieved. In a *Life of Washington* which he published in 1932, many quotations were included which are used again in the present

work. To the reviewer they were rather incidental. Their cumulative effect was not perceived, or if perceived, was certainly not stressed. Whereas Judge Buffington has utilized the same material cumulatively to a very telling purpose.

Perhaps he has incidentally revealed the reason why the radicals concentrate so much of their venom on George Washington. The Father of his Country is to them bourgeois. That is bad enough. Worse yet, if possible, he was religious, which no disciple of the Kremlin could conceivably tolerate. Whether Washington was as fervently religious as the present author believes, may still be open to some question. That he was to a high degree sensitive to religious feeling admits no shadow of a doubt. The present lawyer's brief for the religious life of America's first citizen well deserves a reading.

LOUIS MARTIN SEARS.

Purdue University.

The Living Jefferson, by James Truslow Adams. New York and London: Charles Scribner's Sons. 1936. Mr. Adams had two distinct objects in mind in writing this book. The first was to write a biography of Jefferson and the second was to attack the notion, rather widely held at the present time, that progress consists in a steady increase in the powers and functions of government.

Henry Adams once remarked that it was much easier to write Jefferson down than it was to write him up. His namesake has done the more difficult task excellently. Mr. J. T. Adams has painted his subject as a wealthy Virginia planter with an intense and very catholic interest in ideas but with very sane views as to their practicality. This interest in ideas led to a desire to give the freest scope to their expres-

sion and development. It is the key to his political outlook.

That outlook led to pronounced views as to the proper nature and functions of government. Mr. Adams regards Jefferson as the first and greatest exponent of an urge toward more popular government which comes to a head in this country about once a generation in a regular rhythm. If so, the Virginian intellectual was, like the father of many other movements, very unlike his progeny. As is well known, he believed that government was a necessary evil which should be reduced to a minimum. While he believed that the minimum should derive its authority from the people at large, he favored a system of indirect elections, checks and balances, and limited powers all of which he hoped would lead to the best possible government, operating within the smallest possible area, rather than to the most democratic government. His so-called conflict with Marshall cannot be tortured into proof that the intoxication of power made him forget his earlier ideals. Marshall's decisions irritated him and he had a great personal dislike for his cousin the Chief Justice, but he did not have that relentless hatred of the Supreme Court's power which Beveridge ascribes to him. If he had he could probably have had its powers reduced by constitutional amendment or at the very least limited in the manner in which they were subsequently limited, during the Reconstruction days, by the statute leading to the *McCardle* Case. While Mr. Adams admits the need for judicial review if the country is to retain constitutional government he finds it as difficult to maintain a dispassionate attitude in his appraisal of personalities as have previous writers on the period. Marshall, to him, is simply a man all of whose actions were governed by his "inordinate love of money."

In the latter part of the book Mr. Adams applies Jefferson's ideas to current political problems. Since the Civil War the pulse beats of democracy, as Mr. Adams calls those recurrent urges toward more popular government which he believes are to be expected about once a generation, have been in favor of, rather than against, strong government until the word liberal has come to mean the very antithesis of what it meant to Jefferson. The latter did not deify "society" or "social good" but recognized in such deification merely another form of the Spartan doctrine that the citizens exist for the benefit of the state. As Mr. Adams points out, if we once consent to such deification the comparative freedom of the individual citizen, not only to conduct his own affairs as he pleases but above all to think as he pleases, the ability which Jefferson regarded as the highest good of man, is lost.

KENNETH B. UMBREIT.

New York City.

Guide to Federal Appellate Procedure, by Nathan April. 1936. New York: Prentice-Hall, Inc. Pp. 522. This is a handy book for the use of the busy practitioner in the Circuit Court of Appeals, and to some extent the Supreme Court of the United States. It does not include the United States Court of Appeals for the District of Columbia and the United States Court of Customs and Patent Appeals. The text consists of 189 pages (preceded by XXX pages of Tables of Contents, of Forms and of Cases Cited), the remainder of the volume to page 522 being Forms, Rules

of the ten Circuit Courts of Appeals and Indices. The instructions given as to handling of cases in any of the Appellate Courts is of those matters which are likely to occur in ordinary practice, and the Forms likewise are such as are in constant use. The Rules in the ten Circuits are given in full, but why the Rules of the Supreme Court of the United States should have been omitted except where a necessary part of the text is not explained. It is a handy volume to have on the library table as it will usually answer the ordinary run of questions within its field.

W. J. H.

American Family Laws, by Chester G. Vernier. Vol. 4. 1936. Stanford University Press. Pp. 496. \$5.00.—Volume Four of Vernier's monumental study on American family laws covers relations of children and parents and brings this study within hailing distance of completion. This section of the study follows in general the method of earlier volumes and includes a brief summary of the common law and the statutory law, pertinent comments and criticisms, references and comparative tables. Therefore, it represents a four-fold product, namely, commentary, digest, annotation and reference work.

The topics included in this study range through custody, earnings, property of the child, his support, education and protection, his obligations, domicile, inheritance, legitimation, adoption and torts.

The mood in which this study has been conceived is broad and discriminating from both the legal and the social standpoint. It lends support to the author's position that much legislation has been required to eke out lapses in natural affection and judicial decision. Apparently, existing statutes in the United States are often incomplete and ineffective, and by no means cover adequately the field. In spite of any lack of effort towards uniformity, Vernier concludes that there are three outstanding tendencies in American legislation in the field of parent-child relationship, namely, equalization of both the rights and duties of the two parents, amelioration of the condition of illegitimate children, increasing control by the state in adoption proceedings.

Since this is not a mere fact-finding study, the authors offer certain recommendations. Amongst these are the following:

A few states should legislate to give the mother an equal right to the custody and earnings of minor children. Many states should amend their statutes imposing a civil duty of support upon the parents by adding or clarifying certain provisions. Practically all jurisdictions should liberalize their laws relative to the legitimation of bastard children. A bastard child, even without legislation, should be given full rights of inheritance, provided his affiliation is clearly proved. The Uniform Illegitimacy Act, found in seven states, deserves wider adoption. The use of blood tests in paternity cases, as permitted by a recent New York statute, is recommended for all other jurisdictions (the reviewer is not so absolutely persuaded of the inerrancy of this test as the authors seem to be). Civil suits for seduction should be abolished. Better administrative and judicial supervision of adoption is needed in about one-half of all American jurisdictions. A majority of jurisdictions should provide for the annulment of a valid adoption. All jurisdictions might well pass statutes permitting a minor child to bring suit against

the third person who tortiously injures the parent, if the parent refuses or neglects to sue.

ARTHUR J. TODD.

Northwestern University.

Leading Articles in Current Legal Periodicals

American Journal of International Law, July (Washington, D. C.)—Abuse of Terms: "Recognition"; "War," by Thomas Baty; The Monroe Doctrine and the League Covenant, by John H. Spencer; Fundamental Conceptions of International Law in the Jurisprudence of the Permanent Court of International Justice, by H. Arthur Steiner; Competence to Bind the State to an International Engagement, by Charles Fairman; The 1936 Rules of the Permanent Court of International Justice, by Manley O. Hudson.

California Law Review, July (Berkeley, Calif.)—The Scope and Nature of the California Income Tax, by Roger John Traynor and Frank M. Keesling; Determinable Fees and Fees Upon Conditions Subsequent in California, by William Warren Ferrier; State Taxation of Income, by Walter L. Nossaman.

Journal of Criminal Law and Criminology, July-August (Chicago)—The Jury System in Europe, by Francois Gorphe; The Fascist Political Prisoners, by Nathaniel Cantor; The Training of the Criminologist, by George B. Vold; The Polish Criminal Statistics, by Liebmann Hersch; The Prevention of Crime, by Edgar A. Doll; Is Parole Prediction a Science? by Ray L. Huff; Status of Parole Prediction, by Ferris F. Laune; The Evolution of Punishment, by A. Warren Stearns; Police Duties at Crime Scenes, by Don J. Finney; Evidence in an Election Dispute, by Katherine Applegate Keeler; Police Science Index, by Fred E. Inbau.

Law and Contemporary Problems June (Durham, N. C.)—Extent and Distribution of Urban Tax Delinquency, by Frederick L. Bird; Tax Delinquency of Rural Real Estate, by Donald Jackson; The Tax Calendar and the Use of Instalment Payments, Penalties, and Discounts, by Jens P. Jensen; A New Plan for the Private Financing of Delinquent Tax Payments, by Paul Studenski; Recent Legislative Indulgences to Delinquent Taxpayers, by Wade S. Smith; Tax Receiverships, by Earl H. DeLong and Brendan O. O'Brien; Collection of Delinquent Taxes by Recourse to the Taxed Property, by H. K. Allen; Tax Sales and Foreclosures Under the Model Tax Collection Law, by Henry Brandis, Jr.; Collection of Delinquent Real Property Taxes by Action *In Personam*, by Edward Rubin; The Tax Lien Investor's Relation to the Collection of Delinquent Taxes, by A. U. Rodney; An Approach to a System of "Perfect" Municipal Tax Collections, by Raymond M. Greer; Impediments to Tax Collection Outside the Tax Law, by Philip H. Cormick; Utilization of Reverted Tax Delinquent Land in Rural Areas, by Paul W. Wager.

Michigan Law Review, June (Ann Arbor, Mich.)—Horace LaFayette Wilgus: Uniform Corporation Laws Through Interstate Compacts and Federal Legislation, by Robert S. Stevens; Practical Results of Federal Equity Rule 75 (B) as to Restatement of Testimony in Narrative Form, by Marion L. Severn; Trusts—Restated and Rewritten, by Harry W. Vanneman; State "Blue-Sky" Laws and the Federal Securities Acts, by Russell A. Smith.

Oregon Law Review, June (Eugene, Ore.)—The Civil-Law Concept of the Wife's Position in the Family, by Harriet S. Daggett; Appeal by the State in Criminal Cases, by Lester B. Orfield; The Constitutionality of New Deal Legislation (Hilton Prize Contest): Constitutional Aspects of the Federal Social Security Act, by Herbert O. Skalet; Is the Wagner Bill Constitutional? by Thomas H. Tongue, III; Guffey-Snyder Coal Act, by Otto F. Vanderheit; Dividends of the Tennessee Valley Authority, by Hale G. Thompson.

St. Louis Law Review, June (St. Louis, Mo.)—Reservation of Control by the Settlor of a Private Trust as

Affected by Federal Tax Legislation, by Philip A. Maxeiner; Procedural Delays in Recent Amendments to the Railroad Bankruptcy Act, by Leighton Shields.

Temple Law Quarterly, July (Philadelphia, Pa.)—The Creation of Easements by Implication in Pennsylvania—A Brief Survey of the Cases, by Wm. Cutler Thompson; The Life Tenant and Unproductive Property, by James R. Wilson; Federal Leadership in State Legislation, by W. Brooke Graves; Some Belated Achievements and Unexplored Possibilities and Dangers in the Combination of Issues and Parties, by Warwick Potter Scott.

Texas Law Review, June (Austin, Tex.)—Equitable Prevention of Public Wrongs, by Robert A. Leflar; Compensability Under the Texas Workmen's Compensation Act, by J. John Lawler and Gail Gates Lawler; Functional Indications in Reported Opinions, by Robert W. Stayton.

United States Law Review, July (New York City)—Enjoining the Collection of State and Local Taxes in the Federal Courts, by Morton Pepper.

Yale Law Journal, June (New Haven, Conn.)—Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions: I., by James Lawrence Fly; Some Aspects of Payment by Negotiable Instrument; A Comparative Study, by Friedrich Kessler, Edward H. Levi, and Edwin E. Ferguson; Minimum Rate Power and the Control of Carrier Competition, by Harvey C. Mansfield.

Special Phases of the Omnibus Clause in Insurance Policy

(Continued from page 618)

for which the bailment was made.⁵⁴ The question of liability should the bailee permit some third person to drive has not been squarely decided. It is fairly clear from the inference of several cases that the ordinary bailee cannot grant any such privilege. This authority would exist only where such delegation was clearly contemplated as within the scope of the original permission.⁵⁵

Massachusetts has a statute requiring all owners of automobiles to carry a certain type of insurance.⁵⁶ The wording of the statute is slightly peculiar and the court has given it a sweeping interpretation. It was the desire of the legislature, the court holds, to protect the public fully and to do this every driver should be a responsible person, covered by insurance. This, however, is not consistently carried out. The court construes the statute as meaning that anyone who is "responsible to the assured" and obtaining his permission

54. *Heavilin v. Wendell* (1932) 214 Iowa 844, 241 N.W. 654. Ersland borrowed a car from Wendell, the assured, stating that he wished to go to a nearby drug store to get medicine for his wife. Instead, he took a joy ride around the city, picking up a young lady about noon. Shortly after, he had an accident. The court, in a lengthy discussion of other states, held that the defendant should have received a directed verdict as it was clear that no permission existed. See also *Landry v. Oversen* (1919) 187 Iowa 284, 174 N.W. 255; *Rowland v. Spalti* (1923) 196 Iowa 208, 194 N.W. 90; *Curry v. Bickley* (1923) 196 Iowa 827, 195 N.W. 617; *Seleine v. Wisner* (1925) 200 Iowa 1389; 206 N.W. 130; *Tigue Sales Co. v. Reliance Motor Co.* (1928) 207 Iowa 567, 221 N.W. 514; *Robison v. Shell Petroleum Co.* (1933) 217 Iowa 252, 251 N.W. 613; *Greene v. Lagerquist* (1933) 217 Iowa 718, 252 N.W. 94; *Hunter v. Irwin* (1935) 263 N.W. 34.

55. *McLain v. Armour Co.* (1928) 205 Iowa 343, 218 N.W. 69; *Greene v. Lagerquist*, *supra*.

56. "Indemnity for or protection to the insured and any person responsible for the operation of the insured's motor vehicle with (his) express or implied consent against loss by reason of the liability to pay damages to others for bodily injury, including death at any time resulting therefrom . . . arising out of the ownership, operation, maintenance, control, or use upon the highways of the commonwealth of such motor vehicle." Mass. G. L. (ter. Ed.) c. 90, Sec. 34a.

in the first instance to use the assured automobile is protected no matter how grossly he may violate the terms of the bailment.⁵⁷ Should such bailee, however, permit some third person to drive that third person would not be protected.⁵⁸ Thus it is that the writer says that the purpose of the statute is not fulfilled in its entirety. The bailee, however, does not divest himself of protection by his unauthorized act.⁵⁹

It is when a recovery exceeds the statutory limit that an interesting situation arises. In that case, the driver of the automobile may be a person "responsible" with the original permission up to the recovery limited by statute and yet be a converter acting wholly without authority as regards recovery in excess of that amount, as to which the statute would not apply.⁶⁰ Here Massachusetts takes a very strict view of the term permission holding that none existed where the user of the car had permission to use it at the time and place in question and was doing an act not expressly prohibited by the assured. Since he had neither express or implied permission under the circumstances, no permission could be found.

The statute in Michigan⁶¹ is quite similar to that in California, Iowa, and New York. The question of ownership is raised in several cases, the owner apparently being the person possessing the certificate of title.⁶² So if a transaction of sale is entirely complete, lacking only the actual transfer of the certificate of title, the vendor remains the owner liable to an injured third party. Michigan has held that permission may be implied to cover a bailee of the bailee as, for example, where a salesman permits a prospective customer to op-

erate the automobile.⁶³ This permission is sweepingly enough construed that the original permission is held to include a person operating with the consent of such bailee if the bailee is actually present even where no implied authority was given by the bailment.⁶⁴ From the rather strong language used by the court, it appears that it might not require that the bailee be present. The essential consent, the court holds, is not as to the driver, but as to the vehicle "being driven." The court further states that it is not necessary that the particular driver be known and his driving consented to by the owner. However, if the second bailment had been made contrary to the express orders of the owner, no liability would arise.⁶⁵ There seems to have been no clear cases where the bailee goes beyond the scope of the original permission or where he makes a definite deviation or departure. It would seem that in such a case the owner would be liable unless he has definitely forbidden the use of the automobile under the particular circumstances. The absence of any express prohibition would probably be construed to be an implied permission.

New York adopts its usual hairline reasoning under the leadership of Cardozo to reach some very acute results. The statute reads that "Every owner of a motor vehicle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner."⁶⁶ The holdings under this statute can be generalized fairly accurately as follows:

1. Where A loans an automobile to B and B permits C to drive it, A is liable where (a) B remains in the automobile (b) C is the servant or agent of B even though B is not present or (c) if B is the servant of A, B is negligent in permitting C to operate the automobile—e.g., C is an incompetent or intoxicated individual.⁶⁷
2. Where A permits B to drive the car to one place and B drives it to another A is not liable if he has forbidden B to drive to that place or if such

63. *Lidka v. Wagner et al* (1931) 253 Mich. 378, 235 N.W. 189. See *Rohrer v. Schreiber et al—Ferguson v. Same* (1923) 223 Mich. 355, 193 N.W. 905 where an automobile purchased by the father for son's use and pleasure rendered him liable when so used.

64. *Kerns v. Lewis* (1929) 227 Mich. 727, 224 N.W. 647; Here the defendant operated an auto sales business. The sale manager loaned an automobile to a person who had his car in the garage for repairs. This person permitted his brother to operate it and was riding therein himself at the time of the accident.

65. *Anderson v. Schust Co.* (1933) 262 Mich. 236, 247 N.W. 167. Also where there are no express prohibitions, where the automobile is being used by the employee of the bailee without the knowledge of either the bailee or owner, the owner is not liable. *Union Trust Co. v. American Commercial Car Co.* (1922) 219 Mich. 537, 189 N.W. 23.

66. Section 59 of the Vehicle and Traffic Laws, Consolidated Laws c. 71—formerly section 282e of the Highway Law.

67. While each of these situations is not separately discussed the dicta of the decided cases is clear. See *Arcara v. Moresse et al* (1932) 258 N.Y. 211, 179 N.E. 389; *Grant v. Knepper* (1927) 245 N.Y. 158, 156 N.E. 650. However, see the case of *Jackson v. Brown and Kleinhens Inc. et al* (1935) 284 N.Y.S. 44 which is a sensible modification of the above rule. In the Grant case, Cardozo states "If the driver had left the seat and let the car proceed without anyone at the wheel, the defendant would have been liable for any damage caused thereby. He is not less liable when the driver places at the wheel an incompetent substitute or fails to intervene thereafter with protest or command when protest or command would be timely to avert the loss."

57. *O'Roak v. Lloyds Casualty Co.* (1934) 285 Mass. 532, 189 N.E. 571; *Boudreau v. Maryland Casualty Co.* (1934) 287 Mass. 423, 192 N.E. 38; *Guzenfield v. Liberty Mutual Ins. Co. et al* (1934) 286 Mass. 133, 190 N.E. 23; *Blair v. Traveler's Insurance Co. et al, Garvey v. Same* (1935) 197 N.E. 60.

58. This is, of course, where no express or implied authority to do so is given by the assured. *Johnson v. O'Lalor* (1932) 279 Mass. 10, 180 N.E. 525; *Moschella v. Kilderry et al* (1935) 194 N.E. 728.

59. *Boudreau v. Maryland Casualty Co., supra.*

60. *Blair v. Travelers Insurance Co., supra.* Here, as to the amount in excess of statute the ordinary omnibus clause applied. The court asked "Was Dion an 'assured' within that definition? Toren had given no permission for a pleasure ride on Sunday evening, although he had not expressly forbidden it. Such a ride was not within the express or implied purposes of the bailment, nor incidental to them, but amounted to a conversion of the automobile."

61. Acts No. 56, Public Acts 1927. "The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle whether such negligence consists in a violation of the provisions of the statutes of the state or in the failure to observe such ordinary care in such operation as the rules of the common law require. The owner shall not be liable, however, unless such motor vehicle is being driven with his or her express or implied consent or knowledge."

62. *Tanis v. Eding et al* (1933) 265 Mich. 94, 251 N.W. 367; *Kimber v. Eding* (1933) 262 Mich. 670, 247 N.W. 777; *Endres v. Mara-Richenbacher Co.* (1928) 243 Mich. 5, 219 N.W. 719; *Itelson v. Hagan* (1928) 243 Mich. 6, 222 N.W. 145; *Bos v. Holleman DeWeerd Auto Co.* (1929) 246 Mich. 578, 225 N.W. 1; *Kelly v. Lofts* (1931) 253 Mich. 552, 235 N.W. 250; *Scarborough v. Detroit Operating Co.* (1931) 256 Mich. 173, 239 N.W. 344; *Kruse v. Carey* (1932) 259 Mich. 157, 242 N.W. 873; *Schomburg v. Bayley* (1932) 259 Mich. 135, 242 N.W. 866. One recent case holds G.M.A.C. liable as owner stating that it "had legal title to truck, complete power of control and disposition over it, and was the 'owner.'" *City of St. Joseph v. Grantham Motor Sales Co. et al* (1934) 263 Mich. 260, 257 N.W. 701. One of two joint owners is not held liable by the statute for the negligent operation of the other. *Mittelsdtadt v. Kelly et al* (1918) 202 Mich. 524, 168 N.W. 501.

constitutes a radical departure.⁶⁸ 3. If A loans an automobile to B and forbids B to carry guests or passengers and B has an accident while so doing, then A is not liable to the guests and probably not for the accident at all.⁶⁹ The decisions seem an outgrowth of a desire to give a broad interpretation to the statute in order to protect innocent third persons. The result, however, of establishing liability where B permits a third person to drive and remains in the car and of denying liability where B retains control of the car and permits a third person to accompany him is so ludicrous that it is impossible of any coherent justification. Where both acts are contrary to instructions it would seem more justifiable to establish a liability in the latter case than in the former. It is true that the court lays the blame upon the wording of the statute. It would seem to the writer to be attributable solely to the syllogistic attitude of the New York court, and to be indefensible on any ground. Since the statute is so similar to an omnibus clause, its decisions are important to our discussion.

The statute of Rhode Island at first had no connection with our discussion as it bore no similarity to an omnibus clause.⁷⁰ Recent amendments and interpretations seem to indicate that future cases may be in point. Permission, while sweepingly construed at first,

is now receiving a much narrower interpretation.⁷¹ In any case, determination of liability or non-liability is extraneous to a consideration of omnibus clauses.

We have examined the interpretations of permission under the omnibus clause and under statutes with wordings so similar as to be closely in point. We have seen who has the power to grant permission, when permission is implied, and the limits of the authority given thereby. We have seen a good many inconsistent results obtaining in the various states. There seems to be no real reason for such a great lack of harmony.

Permission, when being construed in connection with new phases of law, should be given the legal connotation usually associated with it. In all of these borrowed car cases it must be remembered that an ordinary bailor-bailee relationship exists—nearly always the gratuitous type of bailment for the benefit of the bailee alone. In cases of such relationships decisions innumerable hold that the bailee must observe the strict terms of the bailment. It is well settled under the common law that if a bailee borrows a horse to ride five miles and rides twenty he then becomes a converter, liable to suit by the bailor.

What is "conversion"? Conversion is any unauthorized act in violation of the terms of the bailment, which tends to repudiate the rights of the bailor. It has been stated that "a right of action accrues to the bailor where the subject matter of the bailment has been used differently from what was intended."⁷² Could such a right of action exist if the assured's automobile were being used and operated with his permission? Certainly not! The moment that a borrower or a bailee exercises an unlawful dominion over the article or uses it in violation of the intention of the bailor, it is clear that he is not acting with the bailor's permission. Permission is the test of the insurer's liability under the omnibus clause. Where a court declares that a bailee has so violated and abused the terms of the bailment as to constitute a conversion, then certainly it is declaring for all purposes that the original permission has been destroyed. Permission and conversion are direct antonyms. Permission, if shown, would defeat such an action. Is it therefore logical that permission can be construed so as to hold the insurer liable and yet so as to allow the bailor recovery against the bailee? It is sufficiently inconsistent that the average modern, well-balanced court would hesitate a long time before permitting the two to be applied at the same time.

Some courts seem to hold that if there is an original bailment, that is, a voluntary surrender of possession by the bailor, that is sufficient permission for all subsequent acts. The reasoning underlying this is highly superficial. The argument advanced above should be able to answer this satisfactorily. There can be only one finding of permission. Either the bailee at the moment of the accident is acting with the permission of the bailor or he is acting without the permission of the bailor. No matter what the purpose of the decision may be, one finding is conclusive. It is to be hoped that courts will in the future rest their decisions upon this subject on a sound basis of logic, and leave the legislation to the state legislatures. That, alone, will cure the ills of the present system.

vet no cases have squarely decided the limits of such statutes. See Minnesota 1933 Laws Chapter 351, and Section 3, Public Act No. 49, District of Columbia, approved May 3, 1935.

71. The broader cases are *Guerin v. Mongeon* (1928) 49 R.I. 414, 143 A. 674; *Kernan v. Webb* (1929) 50 R.I. 394, 148 A. 186. The more recent cases include *Smith v. Tompkins* (1932) 52 R.I. 434, 161 A. 221; *Ford v. Dorcus* (1933) 168 A. 814; *Rogers v. Hebe Co.* (1932) 52 R.I. 274, 160 A. 470; *Hartley v. Johnson* (1934) 175 A. 653.

72. 6 Corpus Juris, page 1151.

68. *Chaika v. Vandenberg* (1929) 252 N.Y. 101, 169, N.E. 103. Here the owner's son borrowed the automobile to drive on Long Island, but instead drove to New York City in violation of his father's orders. "Assent must exist at the time of the negligence * * * The restricted permission did not cover such use. At that time the son was operating the car illegally and without the assent of the owner. A different question would arise if the son had received permission to use the car but had deviated from the owner's instructions as to the manner in which the car was to be used or the route to be taken." See also *Fluegel v. Coudert* (1927) 244 N.Y. 393, 155 N.E. 683.

69. *Psota et al v. Long Island R. Co. et al.* (1927) 246 N.Y. 388, 159 N.E. 180; *Rhodes v. Ocean Accident and Guaranty Corp. Ltd.* (1933) 239 App. Div. 92, 266 N.Y. S. 681. The language of the *Psota* case is scarcely coherent. While the court admits that B had permission to use the automobile at the time and place in question, it states that such permission was only to act within the course of his employment. By taking guests, B places himself outside the scope of his employment and defeats the original consent. The court might mean, therefore, to apply this rule only where a master and servant relationship exist between A and B. This possibility is practically defeated by the court's statement in the *Arcara* case, where no such relationship existed. "Maggio was not instructed that Barone should not be accepted as a guest; he was merely told that Barone must not drive." The *Psota* case then makes the implication that A was relieved only of liability to such guest and not to an injured member of the public and seems to indicate that such a finding would have been made in the *Grant* case had the guest brought suit. It seemed so highly improbable that New York would hold that B was acting with permission toward D and without permission to E at the same time, place, and circumstances that the writer chose to disregard the implications and dicta, observing only the actual result. It should be noted that Cardozo concurred only in the result of the case. Note the decision in the *Fluegel* case in connection with this discussion.

The decision in the *Rhodes* case, which follows the *Psota* case, is even more amusing. The liability policy protected persons while operating or riding in the automobile with the assured's permission. The court held the guests could not recover as they were riding without the assured's consent. Thus the court seems to construe the policy to a personal accident or health policy, rather than one of liability insurance. If this naive attitude represented the law, an innocent third party, not riding in the vehicle, would never be protected. The decision was affirmed in 191 N.E. 502 without any discussion of this phase of the case.

70. Section 3 Ch. 1040 P.L. 1927; Sec. 10 Ch. 1429 P.L. 1929; Ch. 2046 P.L. 1933. The statutes of two other jurisdictions, Minnesota and the District of Columbia also have sections making the driver the agent of the owner if he has an accident while operating the vehicle with the owner's permission. As

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able" cost such as the weighted average cost of the industry? Does it mean below a price that will enable the competitor to live?

Suppose that a particular seller bases his price on large volume but low margins—will he be blamed for injuring a competitor who has to secure a higher margin because of smaller volume?

What consideration is to be given for the desperate competition existing in over-capacitated industries during the time of the depression—when everyone is selling below cost and is competing desperately for volume in order to survive?

Must every seller disclose his costs to the world if the reasonableness of his prices is questioned?

The difficulties which the NRA encountered in endeavoring to operate under provisions of this character are indicative of the difficulties that will be encountered in attempting to apply this rule, especially in criminal cases.

(b) Destroying Competition or Eliminating Competitors

Again, what is the meaning of the phrase "for the purpose of destroying competition or eliminating a competitor?"

If the necessary result of a sale is to injure a competitor, will the seller be held by implication of law to have intended the necessary and foreseeable consequences of his act—regardless of whether he actually intended them in fact. That rule has been applied in many cases under the anti-trust laws. *Patten v. U. S.*, 226 U. S. 525, 541, 543.

Here, however, I believe that it will be necessary to show a specific intent—in the nature of actual "malice." There is a difference between competing to get business and competing to "get" a competitor.

Suppose that one competitor is cutting prices badly while others are not. Can they prevent a second competitor from meeting that competition by pointing out that if he does so he will bring down the general price structure and injure or ruin them? I believe that they can not. He is not acting maliciously but only in self-defense.

Even malice, however, is a somewhat metaphysical conception and men's motives are very often mixed. The normal object of every seller is to build up and increase his own business, which in many cases he can do only by taking business away from his competitor. Can he do this only if he is pure in heart and actuated by no motives of personal irritation or dislike?

Suppose that one competitor has been engaged in particularly annoying practices—such as selling at a differential guaranteed to be always a certain amount below another competitor's price. Can the attacked seller drop his price in order to shake off this attack and to make the aggressive competitor behave? Is he to be condemned if he feels a natural impulse of retaliation as well as self-defense in doing so?

III

CONCLUSION

If Section 3 were open to enforcement by private litigants, it would certainly give rise to an enormous amount of harassing litigation. Fortunately, Section 3 seems to be so drawn that only the Government au-

thorities can enforce it¹⁴—the Department of Justice in criminal proceedings and the Federal Trade Commission in "unfair competition" proceedings under Section 5 of the Federal Trade Commission Act.

It seems reasonable to suppose that the Government authorities in accordance with their usual practice will proceed in a careful and reasonable manner in securing judicial interpretation of an act so doubtful in meaning as this and will not at first bring criminal proceedings under Section 3 except in flagrant cases such as would also constitute violations of Section 1.

It also seems probable that the Government will not bring wholesale proceedings even under Section 1—but will bring a limited number of test cases to secure an interpretation of the Act.

Any other course of action would create public opposition to the law and render more difficult the task of sustaining its constitutionality.

Under these circumstances it would seem that business men should trust the Government to act prudently and conscientiously and should not be stampeded into sudden and revolutionary changes in normal and customary methods of business which have not been the subject of criticism and are not within the spirit of the Act.

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in computing the profits. The allowance was made on the basis of a manufacturing cost, the defendants insisting that market value was the proper basis. Denying the propriety of the latter basis, MR. JUSTICE CARDOZO stated:

"The defendants now insist that the basis should be market value. The acceptance of such a measure would enable the infringers to profit by their wrong. There was no use in the automobile industry for glass so thin as this except in connection with the process described in the complainant's patent. * * * If there had been no infringing business, the large amount of glass that went into the infringing product would never have been sold at all. True, glass of that thickness was used in other industries, in train windows and toilet mirrors. The master finds, however, that Pittsburgh had been able, while supplying glass to Duplate, to respond to all demands that came from other users, the railroads and the glaziers. If as part of this accounting it is given credit for the glass at a price above the cost, it will thereby have enlarged its market to an equivalent extent and reaped a profit as infringer. Equity forbids that this result should be attained."

The defendants' contention that an allowance should be made for a royalty on various patents owned by Pittsburgh was also rejected. After a statement of the contention the opinion proceeded:

"But this is to misconceive utterly the position of an infringer accounting for illicit profits. 'An infringer cannot be heard to say that his superior skill or intelligence enabled him to realize profits by his infringement which

14. This is because of the following reasons: No means of enforcing Section 3 is expressly provided in the Robinson-Patman Act except criminal actions by the Attorney General. Except where such rights are expressly given no private litigant can enforce laws of this character. See *Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165. The provisions of the Clayton Act giving such a remedy for violation of the anti-trust laws do not apply to Section 3 because Section 3 is not made part of Section 2 of the Clayton Act as amended, and so is not technically part of the "anti-trust laws" as defined in the Clayton Act.

a person of less skill might not have realized.' * * * He will be heard with no more patience in an endeavor to diminish liability by ascribing his profits to the capacity indwelling in a patent. Whatever is at his call is the service of the enterprise—brawn and intelligence, factories and lands, patents and machinery—will be viewed upon an accounting as if held upon a quasi-trust to contribute what it can to the profits of the business. The wrongdoer must yield the gains begotten of his wrong."

In connection with the determination of the defendants' profits, the question of the use of average costs was considered, it being recognized that the determination of actual costs was impracticable. In this connection, the Court pointed out that the injured patentee has an election to accept transactions resulting in a gain and to reject those resulting in a loss. The application of this principle was then discussed.

"The privilege of election is not contested by the defendants if costs as well as prices can be ascertained with precision. They take the ground, however, that if such precision is unattainable, the privilege must fail. But the master has found, and the parties are agreed, that in a business of this order there is no method of accounting, not impracticably burdensome, whereby the costs of operation can be apportioned and distributed except upon an average basis. At all events, if such a method was available, the defendants did not use it. They kept their books upon the basis of the method they decry, and measured loss or gain accordingly. Average cost, even if not identical with actual cost, is the best approximation known to accountants. * * * The defendants will not be suffered to charge the complainant with the losses of unprofitable transactions because the gains of the profitable ones cannot be reckoned to a nicety. The wrongdoer bears the burden in cases of confusion."

The opinion was concluded with a brief comment as to the computation of damages. Since it was thought that most of the questions in this regard would be resolved upon application of the principles earlier discussed in the opinion, it is sufficient here to note the rule declared as to allowance of interest.

"If, however, an award of damages upon the basis of a reasonable royalty becomes appropriate again, we think that interest should run from the date when the damages are liquidated, and not, as by the present decree, from the date of the last infringement. * * * There are no exceptional circumstances justifying a departure from what is at least the general rule."

MR. JUSTICE VAN DEVANTER took no part in the case.

The case was argued by Mr. William Watson Smith for the petitioners, and by A. L. O'Shea for the respondent.

Practice—Certified Questions—Set-off in Corporate Reorganization Cases

It is settled practice that the Court will not answer certified questions which are of objectionable generality.

Questions certified to determine abstract propositions, as to the allowance of a set-off by a depository bank in which a railroad in reorganization under Section 77 of the Bankruptcy Act was a depositor at the time of the filing of the petition for reorganization, are of such objectionable generality, and will not be answered. Such questions cannot be answered until they are presented in relation to circumstances affecting the controversy.

Lowden et al. v. Northwestern Nat. Bank and Trust Company, 80 Adv. Ops. 729; 56 Sup. Ct. Rep. 696.

In this case the Court considered three questions certified to it by a Circuit Court of Appeals, re-

lating to procedure in a railroad reorganization case, pending under Section 77 of the Bankruptcy Act. Finding two of the questions to be of objectionable generality, and the third to be dependent on the other two, the Court dismissed the certificate, in an opinion by MR. JUSTICE CARDOZO.

The Chicago Rock Island and Pacific Railway Company filed its petition in Illinois for reorganization on June 7, 1933. At that time it had on deposit in a checking account the sum of \$36,908.72 with the Northwestern National Bank and Trust Company of Minneapolis. At that time the bank owned \$100,000 par value of the railway's First and Refunding Gold Bonds. On June 19, 1933, seven days after receiving a copy of an order approving the petition for reorganization, the bank set off the deposit against the bonds, by appropriate entries on its books. Trustees were appointed for the railway, though it did not appear whether before or after the attempted set-off.

The trustees sued the bank, in Minnesota, to recover the deposits set-off against the bonds. The court sustained the set-off, and on appeal to the circuit court, the latter certified to the Supreme Court the following questions:

"Question 1. Does the right of set-off recognized by section 68 (a) of the Bankruptcy Act apply to reorganization proceedings under section 77 of that act?"

"Question 2. If the first question be answered in the affirmative, can a bank which owns the unmatured bonds of a railroad corporation set off a deposit account of the railroad with the bank against the bonds, upon the filing by the railroad of a petition for reorganization under section 77 of the Bankruptcy Act, alleging that the railroad is unable to meet its debts as they mature?"

"Question 3. If the first and second questions be

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answered in the affirmative, may the United States District Court, for the District of Minnesota, in the suit by the trustees of the railroad's estate to recover the amount deducted from the account of the railroad by the bank under the claimed right of set-off, recognize and establish as a proper set-off by the bank one which was not made until after the filing of the petition for reorganization and which has never been ordered, authorized, approved, or consented to by the court in which that petition was filed and approved?"

After reference to recent decisions as to the rules applicable to certified questions, MR. JUSTICE CARDOZO stated that the first question was too general and abstract to justify an answer.

"Question No. 1 is too general and abstract, its relation to the controversy being indirect and problematical. 'In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.' Bankruptcy Act, § 68 (a); 11 U. S. C. § 108. The precept, framed on the example of ancient laws across the seas (4 Anne, c. 17, § 11; 5 Geo. II, c. 30, § 28), is now applicable by force of statute to the liquidation of estates in bankruptcy. We are asked to announce broadly whether it is applicable with similar inclusiveness to proceedings to reorganize a railroad, though the question tells us nothing as to the facts behind the controversy. 'The court has repeatedly held that it will not answer questions of objectionable generality.' . . . Without a showing of the facts an answer to this question would declare a mere abstraction which might seem too narrow or too broad thereafter when the facts were shown forth. One must see the controversy in its setting before the implications of a ruling can be prefigured with assurance."

The second question, though dependent on the first, was found of objectionable generality on its own account. The Court pointed out that, although the proceeding is brought under the Bankruptcy Act, it is not a bankruptcy proceeding but a reorganization proceeding, in which it is problematical whether the theory underlying § 68 can ever be made to apply, since the latter looks to liquidation of assets, rather than to reorganization. Further developing this aspect, the opinion continues:

"The right of set-off must fit itself to these procedural conditions. It is not susceptible of definition in the abstract without reference to the time or occasion of the controversy or the relation of the suit to the primary proceeding. Irrespective of the acceptance or confirmation of a plan, the trustees must have the power to gather in the assets and keep the business going. To exercise that power, they may find it necessary to sue, and the suit

may turn upon the right of set-off, as it does in the case at hand. In a suit for such a purpose, a suit collateral to the main proceeding and initiated at a time when the outcome of that proceeding is still unknown and unknowable, § 68 of the statute does not control the disposition of the controversy *ex proprio vigore*. It governs, if at all, by indirection and analogy according to the circumstances. The rule to be accepted for the purpose of such a suit is that enforced by courts of equity, which differs from the rule in bankruptcy chiefly in its greater flexibility, the rule in bankruptcy being framed in adaptation to standardized conditions, and that in equity varying with the needs of the occasion, though remaining constant, like the statute, in the absence of deflecting forces."

The defects of the certificate were further elaborated in the following analysis of the issue:

"'Insolvency' in proceedings to reorganize (§ 77) is often very different from 'insolvency' in ordinary bankruptcy (§ 1 (15)). There is at least a possibility that at times the difference may be great enough to vary the resulting equities. When things are called by the same name it is easy for the mind to slide into an assumption that the verbal identity is accompanied in all its sequences by identity of meaning. A court of equity in allowing or rejecting set-off will not be guilty of that fallacy. To know 'the justice of the particular case' . . . one must know the case in its particulars. More concretely, one must know the value of the assets, the temporary or permanent character of the debtor's inability to pay its debts as they mature, the liens, if there are any, superior to the bonds in controversy, the probability of an understanding that the bonds, though unmaturing, would be used to cancel the deposits, all the circumstances, in brief, that might affect the judgment of the chancellor in weighing the competing equities of the interested factions and shaping his decree accordingly. We have no thought at this time to foreshadow the result of an exploring expedition directed to those ends. When all the facts are known, they may be found to offer no excuse for a departure from the rule in bankruptcy which, as indicated already, is generally, even if not always, the rule in equity as well. They may point, on the other hand, to the need for an exception, or may even lead to a decree in the nature of a compromise, the moneys being paid into the registry of the court to abide its future action. A decision balancing the equities must await the exposure of a concrete situation with all its qualifying incidents. What we disclaim at the moment is a willingness to put the law into a strait-jacket by subjecting it to a pronouncement of needless generality."

The case was argued by Messrs. Edward S. Stringer and Marcus L. Bell for the Trustees of the debtor railway, and by Mr. Claude G. Krause for the Bank.

Current Events

(Continued from page 592)

injure its contemplated financing through the publicity given the hearing.

The Commission finds, in the Supreme Court's opinion in the Jones case, a clear implication that, had the registration statement there under question already become effective, "or had securities been sold to the public thereunder, no such unqualified right of withdrawal would have existed." The Commission's opinion concluded that, where a registrant has made its filed statement effective and has sold securities thereunder, and "against whom the Commission is now the moving party, [it] may

not by withdrawal terminate the proceedings commenced against it and thus avoid the decision on the merits to which the public is entitled under" the Securities Act of 1933, Sec. 8.

A further clarification of the Securities and Exchange Commission's authority, in an entirely different respect, occurred in the District Court of the United States for the District of Columbia when Judge Jennings Bailey denied an injunction whereby it was sought to prevent an investigation which the Commission was making of investment trusts.

The company seeking the injunction was the Equity Corporation of Newark, N. J. It sought, first, to restrain the Commission from forcing a stockholder and former director of its predecessor to testify; and second, to prevent the Commission from forcing the corporation to turn over its records.

Upon the court's inquiry, David Schenker, counsel for the Commission, stated that Congress desired the information in order to determine whether 810 investment trusts which had a total of 1,100,000 stockholders were, through the mails, perpetrating fraud on investors. The case, in part, turned upon whether the "study" of investment trusts which Congress had authorized would justify the Commission's "investigation."

News of the Bar Associations

Idaho State Bar Receives Report of Committee Appointed to Investigate Practice and Compensation of Attorneys—Law Earnings Shown Generally—Teaching of Constitution in Schools Urged

THE 1936 meeting of the Idaho State Bar was the best attended of any for several years. It was held at the summer resort of Payette Lakes Inn at McCall, Idaho, and was preceded on the afternoon of July 23rd by a meeting of the Judicial Section, made up of Justices and Ex-Justices of the Supreme Court and District Judges and Ex-District Judges, with Hon. Chas. F. Koelsch presiding as Chairman.

The Section discussed and tentatively adopted uniform rules for the District Courts of the State. These Rules were subsequently submitted to the meeting of the attorneys, and suggestions having been received, were referred back for final drafting and adoption. The Section also discussed suggested changes in substantive criminal statutes, and in this discussion joined with the Prosecuting Attorneys' Section, which met at the same time, resulting in recommendations with respect to the pleading of insanity as a defense in criminal actions and in changes in the matter of indictment and information.

Hon. James F. Ailshie, who had the previous year discussed the Rule-Making Power of the Courts generally, continued the discussion as to the specific power of the Idaho Courts, and gave the same address to the assembled attorneys on the morning of July 25th, at which time recommendations were directed to be placed in the hands of the legislative committee of the Bar.

During the past year the State Bar has been instrumental in organizing, under Rule of the Supreme Court, local Bars covering the entire State, and this has been accomplished, with the exception of two Judicial Districts. Such local Bars were granted a large measure of self-government, and a committee from each of them met on July 23rd to draft uniform by-laws and rules applicable to all of them, for submission to the Bar Commission and Court for approval. The results were submitted to the Bar on Friday afternoon, and adopted.

The meeting convened on Friday, July 24th. They received the report of the Secretary and of the Prosecuting Attorneys' Section, and then listened to



HON. WALTER H. ANDERSON
President, Idaho State Bar

the annual address of the President, John W. Graham of Twin Falls, and an address by Hon. Adam B. Barclay, District Judge, on the Defense of Insanity in Idaho Criminal Cases. Both addresses provoked extended and helpful discussion.

In the afternoon, in addition to the reports of the local Bars committee and the Judicial Section, the tentative result of the survey being conducted by the Idaho State Bar with respect to practice and compensation of attorneys, was received from J. L. Eberle, Chairman of the Survey Committee. The tentative report indicating generally low earning power of attorneys was a matter of considerable surprise and discussion. Prof. Bert Hopkins, from the College of Law, University of Idaho, delivered a very informative address on the Idaho Declaratory Judgment Law, giving the history of such Statutes and the possibilities of their use in considerable detail.

As a result of the vote for Commissioner of the Western Division,

J. L. Eberle of Boise was elected for a three-year term.

On Friday evening Walter H. Hanson presided as Toastmaster at the annual banquet.

The Saturday morning session opened with a report by Hon. Raymond L. Givens, Chief Justice of the Supreme Court, as Chairman of the Committee on Methods of Judicial Selection. The report was very exhaustive as to the methods used in other jurisdictions, and the various theories for such selection were laid before the Bar in detail, and will doubtless form a basis for some definite action by the Bar in the future. Hon. A. A. Fraser addressed the Bar on some aspects of circumstantial evidence. Discussion of the reduction of cost of litigation resulted in suggestions which are to be referred to the Legislative Committee.

At the afternoon session, in the absence of Roy L. Black, to whom the subject had been assigned, Carl Swanson presented the subject of "Should Automobile Insurance be Compulsory?" He outlined the statute now in force in various States and the experience of such States with such regulations. Tentative suggestion for an increase of the annual attorneys' license fee from \$5.00 to \$7.50 was discussed, with no final action taken, after which Hon. H. A. Baker read a paper prepared by Hon. Alfred Budge, who was unavoidably absent, on the History of the Idaho State Bar. This paper gathered together the various facts in relation to the adoption of the present statute form of organization by Idaho among the first of the States.

The sessions were concluded by the introduction of the newly elected President, Walter H. Anderson of Pocatello, who had previously served as a Commissioner for two years; adoption of resolutions in memory of attorneys who have died since the last meeting; proposal of conditions under which foreign attorneys may engage in practice in Idaho; and by urging the teaching of the Constitution and American system of government in the schools. Greetings were sent by the Bar to Hon. Isaac N. Sullivan, dean of the Idaho Bar and for twenty-five years Justice of the Supreme Court, whose eighty-seven years made it impossible for him to attend the meeting.

SAM S. GRIFFIN,
Secretary.

Maryland State Bar Association Provides Funds for State Annotations of American Law Institute's Publications—Hears Explanation of Proposed Reorganization of National Bar—"Roger Brooke Taney Day"—Able Addresses

THE Forty-first Annual Meeting of the Maryland State Bar Association was held at the Ambassador Hotel, Atlantic City, New Jersey, on July 2nd, 3d, and 4th, 1936, with a large attendance, President George Weems Williams of Baltimore, presiding. The Bench was unusually well represented, there being present Chief Judge Carroll T. Bond, of the Court of Appeals, Chief Judge Samuel K. Dennis of the Supreme Bench of Baltimore City, and Judges from many of the Circuits of the State. As a matter of history, the Bench of Maryland have supported the activities of the Association.

The meeting, in addition to its strictly business side, makes quite an item of its social features, and consequently it is well attended by the wives of the members. On the evening before the official opening of the meeting, a dinner and dance was given for the members and ladies accompanying them.

The business meeting was opened on July 2nd and the morning session was devoted to the reports of Officials and Standing Committees of the Association, including the Committee on Laws, Legal Education, Grievances, Legal Biography, Law Institute, and the Committee on Commissions of Executors and Administrators.

As has been its custom, the Association received a full Report as to the work of the Law Institute, and donated a sum of money to provide for the preparation of the Annotations of the Law already completed by the Institute. Exhibits were present of Annotations already completed.

The Association has during the past year presented to the Court of Appeals its request that the pre-educational requirements of those desiring to be admitted to the Bar should be laid down by that Court, and although the Court has indicated its conclusion that the law of Maryland did not place that power in the Court, yet the Association is still advocating this procedure. Being an off year with the State Legislature, the recommendations of the Committee on Laws and Legal Education were referred back either to the Executive Council or the Committees for further consideration and report.

In the evening of the first day, the President, George Weems Williams, addressed the Association on the subject of "Two Days in a Maryland Court,"



HON. JOHN S. NEWMAN
President, Maryland State Bar Association

emphasizing the proceedings before the State Industrial Accident Commission, drawing particular attention to the Workmen's Compensation Act. He also suggested that a defendant in an automobile case should be given the right to have brought into the suit any person who may have caused or contributed to the happening of the accident, and also that guests and relatives of a motorist be denied the right to sue for damages following an automobile accident, unless the motorist intentionally caused the accident, or it resulted from a willful or wanton disregard of the rights of the passengers.

On Friday, July 3d, the meeting was devoted to an explanation of the proposed reorganization of the American Bar Association, which was made by Alexander Armstrong; and to an Address by Judge W. Calvin Chesnut, Judge of the District Court of the United States for the District of Maryland, his subject being "The History of the Federal Courts in Maryland."

Judge Chesnut outlined the history of the Federal Court in Maryland from the days of the Circuit-riding Judge up to the present time. He pointed out that since 1781, when the first United States District Court was created, there have been only 13 Judges to serve on that Bench in 145 years, the first being William Paca, who served from 1791 to

1799. He pointed out each step of advancement made in the Courts and emphasized the trying times of the Civil War, quoted a charge made to a retiring Grand Jury by Judge William F. Giles, and also emphasized the importance of citizens taking an interest in the Government and Courts. It was not only a learned address, but an intensely interesting one, holding an audience of ladies and gentlemen in rapt attention on what would ordinarily be considered a dry subject. The audience showed its regret when he brought his address to a close.

The evening session was given over to an address by Hon. Stanley Reed, Solicitor General of the United States, his subject being "The Constitution and Today's Problems." It was a scholarly presentation of Mr. Reed's views and was delivered in a clear and concise manner. Mr. Reed pointed out the fact that our period is one of economic and social readjustment, and that legislation must keep pace with economic and social requirements. He stated that the people of America must find in the membership of the Bar ability to guide them through uncertainties to a type of progress which is in harmony both with our Constitution and with contemporary needs.

On Saturday, July 4th, the meeting was given over entirely to what was termed 'Roger Brooke Taney Day' and addresses were made by Alexander Armstrong, his subject being "A brief Survey of His Life;" by Edward E. Delaplaine his subject being "His Home;" and by Hon. Dean Acheson, former First Assistant Secretary of the Treasury of the United States, his subject being "Some Phases of His Legal Opinions."

The meeting was in celebration of the One Hundredth Anniversary of the taking of oath of office by Mr. Justice Taney, who was, for a long period, Chief Justice of the United States Supreme Court. At the meeting there were exhibited a large portrait of the Chief Justice and several mementoes of his life, together with pictures of his home at Frederick, Maryland, which is now controlled by the Taney Association, and which is open to public inspection.

In describing the meeting it might be said that it was very unusual, very instructive, and very entertaining. Mr. Acheson read a very carefully prepared paper emphasizing the outstanding opinions of the Chief Justice on the many questions which came before the Supreme Court while he presided. The Bar of Maryland is very proud of the legal ability of the great Chief Justice and of his pure and sweet home life.

In the evening the Annual Banquet of the Association was held, the Toast-

master being Judge Eli Frank of the Supreme Bench of Baltimore City. Judge Frank was quite happy in his remarks and at the same time was bold in stating that for the time being he would assume jurisdiction over the Maryland Bar although it was then meeting in the State of New Jersey. He gave each speaker a splendid introduction and started them out with enthusiasm and applause.

Addresses were made by the newly elected President of the Association, Judge John S. Newman, of Frederick; by Judge J. Harry Covington of the District of Columbia Bar; and by Hon. Claud M. Sapp, United States Attorney for the Eastern District of South Carolina. The addresses were both humorous and instructive.

Probably 200 sat at the banquet which was a typical Maryland spread, and was prepared by R. Bennett Darnall, Treasurer of the Association.

Judge Covington appealed for action on the part of members of the Bar in the solution of the problems of the day,

placing particular emphasis on the learning and courage of the Bar. Mr. Sapp stated that while he realized the troublesome times in which we are now living, yet he felt that with cool heads everything would come out all right as in former periods of distress and panic. He gave many apt and striking illustrations from the lives of the people back home, and especially those of the Negro race.

The newly elected Officers of the Association are: President, John S. Newman of Frederick City, Maryland; Secretary, James W. Chapman, Jr., of Baltimore, Maryland; Treasurer, R. Bennett Darnall of Baltimore, Maryland; together with an Executive Council consisting of Frederick W. Brune and Allan H. Fisher of Baltimore, H. Courtenay Jenifer of Towson, and James Clark of Ellicott City. Vice-Presidents were elected from each of the eight Circuits.

JAMES W. CHAPMAN, JR.,
Secretary.

Minnesota State Bar Association to Make Drive for Establishment of Judicial Council and Creation of Office of Statute Revisor—Plan for Improved Organization of Profession Approved

A CONCENTRATED legislative drive in 1937 to secure the establishment of a Judicial Council and the creation of a Statute Revisor, will be made by the Minnesota State Bar Association as the result of action taken at the annual meeting of the Association at Breezy Point Lodge, Pequot, Minnesota, July 8th, 9th and 10th.

The Association also adopted a resolution approving the plan for bringing about a representative and improved organization of the legal profession of the United States as prepared by the Coordination Committee of the American Bar Association.

A new feature of the meeting this year was the conferences, at which various subjects were discussed by members of the Association. Among the topics discussed were "Real Property Law," "Extraordinary Writs in the Supreme Court," "Practice Before Federal Tribunals," and "Administration and Effect of Social Security Legislation, both State and National, on the Average Client."

On the recommendation of its committee on Jurisprudence and Law Reform, the Association directed the appointment of a special committee to study the question of substituting the



HON. M. J. DOHERTY
President, Minnesota State Bar Association

rules of Comparative Negligence for the rule of Contributory Negligence. This committee will report back to the mid-winter meeting of the Association.

The principal address was delivered by Judge Orrie L. Phillips of the United States Circuit Court of Appeals on the

subject, "Historical Analogies and Present-Day Tendencies."

Officers for the ensuing year who were elected are President, M. J. Doherty, E-1006 1st National Bank Building, St. Paul; Vice-President, James H. Hall, Marshall; Treasurer, William G. Graves, 520 Endicott Building, St. Paul; Secretary, Donald C. Rogers, 600 New York Life Building, Minneapolis.

DONALD C. ROGERS, Secretary.

New Jersey State Bar Association Approves Coordination Plan to Be Acted on by American Association—Section of Banking Law Created

THE thirty-eighth annual meeting of the New Jersey State Bar Association held at the Marlborough-Blenheim Hotel in Atlantic City, New Jersey, June 5 and 6, 1936, was very well attended. Election of officers for the ensuing year, the creation of a new Section of Banking Law, the acceptance of the Coordination Plan of the American Bar Association, the presentation of an exhaustive report giving the present status of unauthorized practice of the law in New Jersey as compared with other states, a well-attended banquet with most interesting speakers, were a few of the high lights of the meeting.

There were three business sessions all of which were presided over by Hon. Herbert C. Bartlett of Vineland, President of the Association.

The new officers and directors for the ensuing year who were elected during the first session upon nomination of the Committee of which Mr. Josiah Stryker was Chairman are: President, Mr. William W. Evans of Paterson; First Vice President, Mr. Arthur T. Vanderbilt of Newark; Second Vice President, Mr. William J. Morrison, Jr., of Hackensack; Third Vice President, Mr. William D. Lippincott of Camden; Treasurer, Mr. Joseph J. Summerill, Jr., of Camden; and Secretary, Miss Emma E. Dillon of Trenton; Directors: Mr. Allen B. Endicott, Jr. of Atlantic City; Mr. Julius Sklar of Camden, and Mr. Jav B. Tomlinson of Bordentown.

The growing interest in the Association throughout the state was indicated by the report of the Committee on Admissions, of which Mr. David Armstrong of Rahway was Chairman, which showed a net increase of 140 members during the past year. The new Junior

and Banking Law sections and the aggressive action of the Association with regard to the unauthorized practice of the law, were all contributing factors to this increase during times which are so difficult in the profession.

A Committee on Legal Aid with Mr. Edward I. Berry of Camden as Chairman had been appointed during the year and made its first report. This was in the nature of a tentative survey since the committee has not been in existence long enough to have made an exhaustive study of this question.

The Committee on Americanization with Mr. John B. Zabriskie of Hackensack as Chairman did some interesting work during the year. The report was comprehensive in its recommendations and showed that the activities of the Association in this line are growing rapidly.

The Junior Section which was created a year ago reported through its Secretary, Mr. Julius Sklar of Camden. The report showed that this section is now firmly organized and its activities are well directed. There has been close cooperation between the members of this Section and the officers and directors of the Association during the past year which is expected to continue.

The Section on Banking Law held its organization meeting immediately prior to the sessions of the annual meeting of the Association. Mr. Nathan Bilder of Newark, the newly appointed Chairman of the Section, reported that good progress had been made with the organization and that it was expected to have the section operating by the fall. Much interest was indicated in this new venture.

A very lengthy report on the unauthorized practice was made by Mr. Milton M. Unger of Newark, Chairman of the Committee. This report showed not only an exhaustive research into this problem but also an aggressive attitude on the part of the Committee to correct the evils which have grown in New Jersey. Several recommendations were made to the Association. This report, with that of the Committee on Legislation headed by Mr. William W. Evans of Paterson, showed that these two committees have worked together very closely during the past year, especially in efforts to have a civil practice law enacted to penalize the unauthorized and unlawful practice of the law, as yet unsuccessful. Both reports stressed the need of united action on the part of the Bar to correct the widespread practice of law by other than lawyers. The question of integration of the Bar, a phase being studied by a special committee of the Association headed by Mr. Edmund

S. Johnson of Jersey City, was also seen as closely interrelated with these other problems. There will be continued cooperation between these three active committees. New Jersey has embarked on an aggressive campaign to study and solve this more important problem within this state.

Dr. Frank Kingdon, President of the University of Newark, delivered an address on Friday evening under the topic of "A Growing Conviction." He stressed the fact that law and lawyers are part of a great social movement and that we can be of greater service to our

fellowmen by looking beyond the strict confines of the profession.

Hon. William L. Ransom, President of the American Bar Association, gave an informal address on the new plan of that Association. One of the most interesting parts of his talk was the encouragement of the idea of studying the activities in other State Bar Associations. This tends to strengthen the individual states. The problems of integration of the Bar and unauthorized practice of the law would seem to be those which have occupied many of the states in recent years. Judge Ransom's

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HON. WILLIAM W. EVANS
President, New Jersey State Bar
Association

talk was very well received and the members present at the meeting were much heartened by the fact that our continued efforts to meet our problems in New Jersey will eventually meet with success as they have in other places. Once again, the need for coordinated effort was apparent. After Judge Ransom's talk, Mr. Louis E. Stern of Newark, Chairman of the Committee to study the proposed Coordination Plan of the American Bar Association, presented the report of the study of that committee with recommendations that we direct our delegates to vote for the plan. It was noted with much pleasure that Mr. Sylvester C. Smith, Jr. of Phillipsburg, one of our active members, is the Chairman of the Committee of the American Bar Association which finally evolved the proposed plan.

At the last business session, Judge Bartlett, the retiring president, addressed the members on the topic "The Lawyer—What of the Future?" This was a plain statement of the present status of the practice of the law and concluded with a quotation that the only way there could be the proper protection to the public through the upholding of the work and traditions of the Bar is through the effort of every member of the profession.

The sincere and successful leadership of Judge Bartlett during the past year was expressed through a motion from the floor and the respectful rising vote and applause at the conclusion of his talk. The new president, William W. Evans of Paterson, was presented with

the gavel of the Association by Judge Bartlett, the retiring president. Mr. Evans outlined the current problems of the Association, expressed his appreciation at the great honor which had been conferred upon him in having been made president, and asked for the same cooperation which has been given him heretofore particularly as Chairman of the Committee on Legislation.

The annual dinner which was held in the Wedgewood Room of the same hotel, was the best attended to date. The guests of honor were members of the Judiciary of the State and the President of the American Bar Association, with Judge Herbert C. Bartlett as the genial toastmaster. There were orchestra music and singing by the Atlantic City Male Chorus which were well received. Hon. Thomas J. Brogan of Jersey City, Chief Justice of the State of New Jersey, spoke on "The Judiciary and the Bar." Justice Brogan's address showed that he is keenly appreciative of and interested in the problems of the members of the Bar. A number of humorous reminiscences indicated that

he had not forgotten some of his own experiences as a practitioner. We learned that our Chief Justice is an understanding friend of the profession as well as a profound jurist.

The first speaker to come from the Federal Bureau of Investigation of the Department of Justice to address any meeting of the Association was Hon. Hugh H. Clegg, its Assistant Director. Mr. Clegg addressed us on "The Crusade of Crime" and he pictured the criminal, his crimes, his opportunities to escape the law, and other advantages, in such manner that no person present could escape the realization that there is an individual responsibility to help wipe out this scourge of our day.

In addition to the business of the meeting and the banquet, there was much social activity. Those who attended the annual meeting felt that much work had been accomplished, many friendships renewed, and much inspiration gained during the week end.

EMMA E. DILLON,
Secretary.

Ohio State Bar Association Votes Overwhelmingly for Plan for Appointment of Justices of the Supreme Court and Courts of Appeal—Solicitor General Stanley Reed Speaks on the Constitution.

THE Ohio State Bar Association convened for its Summer Meeting in Columbus on July 9, 10 and 11. The fact that these dates coincided with some of the hottest weather on record in Columbus did not prevent the carrying out of an extraordinarily full program for each of eight general sessions and the various section meetings.

Greatest interest centered in the discussion of the report of the Committee on Selection and Tenure of Judges. More than two hours of the Thursday afternoon session were devoted to this matter and the meeting voted overwhelmingly for a plan by which the Governor will appoint, subject to confirmation by the Senate, each of the Justices of the Supreme Court and of the Courts of Appeal, from a list of not less than three or more than five persons recommended by the Judicial Council. The Council consists of the Chief Justice of the Supreme Court, a judge of the Court of Appeals, a common pleas judge, a municipal judge, a probate judge, and three practicing attorneys. The judges so appointed are to run against their record every six years—the question on the ballot being, "Shall this judge be retained in office?" President Charles W. Racine of To-



HON. GEORGE R. MURRAY
President, Ohio State Bar Association

ledo called the convention to order Thursday morning, July 9. This session was devoted largely to committee reports. Among these were the reports of the Committee on Insurance Practice and the Committee on Unauthorized Practice of Law. The former

committee had been cooperating with the investigation being conducted by the State Division of Insurance into fake insurance claims, to determine if doctors, lawyers, insurance representatives and others had been guilty of wrongful conduct. The committee was ordered to continue its work. The report of the Unauthorized Practice Committees, Milo J. Warner of Toledo, chairman, emphasized the fact that in Ohio the problem is chiefly and almost entirely one for the courts. A program of education to point out the public benefit in the suppression of unauthorized practice of law was recommended.

The Thursday afternoon session was devoted largely to the matter of judicial selection as indicated above. Other matters considered (all of which fell within the scope of the Committee on Judicial Administration and Legal Reform) included marriage, divorce and separation, simplification of trial procedure, and unification of inferior courts.

At the Dinner Session Thursday evening, the address was delivered by the Honorable Murray Seasongood of Cincinnati on the subject, "Is Law the Perfection of Reason?" He recommended that there be apportionment of contributing negligence and negligence with recovery accordingly, likewise the abolition of terms of court, permitting a wife to recover for loss of her husband's services and consortium, allowances of expenses to defendants in condemnation cases, abolition of the distinction between governmental and proprietary functions of municipalities, making charities liable for negligence, and permitting parties to moot cases, to prosecute litigation to conclusion.

Friday morning was devoted to committee reports and an address by James B. Alley, General Counsel for the Reconstruction Finance Corporation on the subject, "Some Corporate Reorganization Problems." The Friday afternoon session heard Solicitor-General Stanley Reed discuss "The Constitution, a Vital Institution." The processes of government, he stated, are not static, rather a system of government is created, expanded, contracted, adjusted, and readjusted to meet the varying needs of the nation. In conclusion, he pointed out that the opportunity and the necessity for the Government's service to its people cannot be confined within rigid limits, that the Constitution itself states no such bounds, that it is a living, vital institution, whose function is to guide, not to curb necessary governmental processes, and that so to construe and apply our organic law is to preserve, protect and defend the Constitution of the United States.

At the dinner session Friday evening



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Senator King of Utah deplored the currents of political and economic thought which are disturbing the nation, and bringing confusion, uncertainty, and doubt with respect to certain matters hitherto considered fundamental. He urged the preservation of constitutional landmarks to the end that the United States might be a light and inspiration to other nations.

The Saturday sessions were devoted to committee reports and election of officers. Hon. George R. Murray of Dayton was elected President, and J. L. W. Henney of Columbus was re-elected Secretary and Treasurer.

The Saturday Luncheon Meeting was addressed by Harold Nathan of the

U. S. Department of Justice on the subject, "Crime and the Federal Bureau of Investigation." At the Annual Banquet on Saturday evening a humorous address "Ad Interim" was delivered by Robert C. Dunn of Toledo. This was followed by the principal address by Hon. William J. Donovan, formerly Assistant Attorney General of the United States, who discussed the present state of democracy in America.

The first session of a Council of Delegates was held on Thursday. Other special meetings were held on insurance law, municipal law, real estate law, and taxation law. The Prosecuting Attorneys' Section and the League of Ohio Law Schools also met.



HON. R. B. GRAVES
President, Wisconsin State Bar Association

Wisconsin State Bar Association Holds Highly Successful Annual Convention—Record Membership Reported—Addresses Make Program of Practical Value to Average Lawyer, Etc.

THE Association was fortunate this year in that many factors seemed to contribute toward making the annual convention one of the best, if not the best, the Association has ever held. The efforts of the program committees to make the papers and the discussions of practical value to the "average lawyer," were successful and probably helped increase attendance, which was the largest in several years.

The entertainment features were more elaborate than usual, and seemed to meet with general approval. The gathering "around the punchbowl," the "cocktail hour," the swimming and diving exhibitions by experts, the cabaret party at Lawsonia Monday evening, and the dance and floor shows at Sherwood Forest hotel, all in addition to the usual golf and bridge tournaments, were sandwiched in between sessions so as to interfere as little as possible with the more serious parts of the program. These "lighter" features helped measurably to a wider and more cordial acquaintance among the members and their wives, and a good fellowship, which, it is safe to say, has not been equalled in any previous gathering of the Association. Ideal weather throughout added to the comfort, pleasure, and enjoyment of everyone, and aided materially to make the whole program run through smoothly and without a hitch.

We were pleased and honored to have as our guests William L. Ransom, president, and Mrs. Olive G. Ricker, executive secretary, of the American Bar Association; also Mr. and Mrs. Harvey T. Harrison of Little Rock, Arkansas. Judge Ransom delivered an impressive message as to bar organiza-

tion, the necessity for it, and the obligations which the Bar, through its organizations, owes to itself and to the public. He paid high tribute to Wisconsin lawyers and judges and expressed appreciation for aid and support they have given to the things the American Bar Association is trying to do. He pointed out how lawyers once spoke as individuals in advocating causes but now speak and act through representative organizations, and said "our great consideration is what the average lawyer, the whole profession, can and will do for his state and country, for the public, and for the better administration of justice and the preservation of liberty, opportunity and security for the American people." He also stressed the need for unity of the legal profession in the city and county bar associations and the federation of these groups into state associations. Truly representative organization is being accomplished in nearly half the states through adoption of the integrated or inclusive bar, he said, while in many other states the integrated bar is the foremost issue. He expressed belief that within a few years practically every state in the union will have either an all-inclusive or a strongly majority organization of their bar.

Mr. Harrison's address was most humorous and pleasing. He held the interest of his large audience from beginning to end and kept them filled with irrepressible laughter most of the time.

The addresses by Judge Ransom and Mr. Harrison will be printed in full in the 1936 Proceedings.

President Oestreich's address reviewed the work of the Association

during the past year, particularly with reference to the integrated bar plan. He told what was done in support of it in the legislature and enumerated various reasons advanced in favor of the Integrated Bar bill and the objections raised by those who opposed it. When the bill came up for discussion in the assembly he was shocked at the words of abuse and calumny leveled at the legal profession. Attempting to analyze this apparent general attitude of distrust and disrespect toward the profession, he suggested it might be due in part to the practice, indulged in by many speakers, of painting "beautiful word pictures" of the high ideals and standards of the profession, which, though true in a sense, are an exaggeration when compared with "practical conditions and defined remedies" as they actually exist and as compared with the requirements laid down by our text books on legal ethics. He said also we have been acting in the dual capacity of preacher and performer, a somewhat difficult position. He suggested we should cease broadcasting that we have a few errant brothers among us, and should go "vigorously and manfully about correcting" that situation, but quietly and without fuss and feathers. He recommended advertising our virtues rather than our faults, and suggested an efficiently organized and coordinated bar would assist in performing the work ahead of us. He believes the Bar is overcrowded and advocated restricting admissions to such number as can "adequately do the professional work of society."

Following the President's address, the Association listened to a very inter-

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April 16, 1936

Mr. Frederick Moss
San Francisco, California

Dear Mr. Moss:

Some days ago the Lawyer's Co-operative Publishing Company made delivery to us of the first two volumes of "AMERICAN JURISPRUDENCE." We take it that this was done at your suggestion.

We have now had a chance to examine these books and in all ways we find them to our liking. Particularly the many references to different works on selected cases such as A.L.R. We have always felt that R.C.L., which "AMERICAN JURISPRUDENCE" succeeds, was the outstanding work in the treatment of general principles of law. The new "AMERICAN JURISPRUDENCE" greatly amplifies and extends R.C.L. The entire editorial work is so clear and well stated that it leaves little to be desired.

When the books arrived we had occasion to check out a pending question on the subject of abatement and revival. There was opportunity to study that article in Volume I. The question with which we were concerned was of an involved character, but we were able to find it fully treated in "AMERICAN JURISPRUDENCE"; also the citation of a California case to support the text.

We trust that the publishers will complete this new work as soon as possible, because we anticipate it will be of great and lasting value.

Yours very truly,

HADSELL, SWEET, INGALLS & LAMB

(Signed) Everett A. Ingalls

EAI:MPM

Since the above letter was written, volume three of AMERICAN JURISPRUDENCE has been delivered and volumes four and five are rapidly nearing completion. Investigate while the unusual charter subscriber offer is still in effect.

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A. C. Gaw, Secy.,
Elkhart, Indiana

Have it reported—"The Record
Never Forgets."

esting and valuable report of the Committee on "The Forgotten Lawyer," presented by John P. McGalloway, Fond du Lac, as chairman. Discussion of the report followed by Glenn W. Stephens, Madison, who personally conducted an independent survey. The report emphasized the necessity of professional contact through Bar organizations, keeping up the membership, continuing publication of the Bulletin and the holding of annual and sectional meetings. The report also recommended a plan to welcome new lawyers into the profession in groups when they are admitted to practice, the institution of "the experienced lawyer service," and conducting elections by mail. It particularly emphasized the importance of building up the membership and called on all members to help in this by asking their non-member friends to join. Interesting discussion of the report followed by Walter T. Bie, Green Bay, Reuben W. Peterson, Berlin.

The report of the Committee on Coordination of the Bar was presented by T. P. Silverwood of Green Bay, and Carl B. Rix, Milwaukee, at the close of which the Association voted unanimously to approve the plan for coordination now before the American Bar Association.

The membership committee reported 185 new members, making a total of 1,776, the largest yet reported, and comprising more than half the lawyers in the state.

In addition to the usual committee reports, many of which contained valuable recommendations, the program included a "Legal Clinic" on the subject of Federal Liens, the discussion of

which was led by Heber H. Pelkey of Appleton and Glenn Bell, of Madison. This was followed by a discussion by Claude J. Hendricks of Milwaukee, of "Proposed Legislation to Remove Doubts Upon Real Estate Titles by the opinion in Douglas vs. Ransom, 205 Wis. 439.

Hon. August C. Hoppmann, circuit judge, Madison, spoke on the subject of Problems in Trials. His address was filled with valuable suggestions for the proper conduct of attorneys in their work before the trial courts, given, of course, from the point of view of the trial judge.

All three of the numbers above referred to were procured with a view to making the program of practical value and interest to the "average" lawyer in his every day work, and were highly successful in accomplishing that object.

Election of officers for the ensuing year resulted as follows:

President, Ray B. Graves, Wisconsin Rapids; Vice President, Benjamin Poss, Milwaukee; Secretary and Treasurer, Gilson G. Glasier, Madison.

Board of Governors, by circuits: First: Edward J. Ruetz, Kenosha; Second: Edmund B. Shea, Bernard V. Brady, Reginald I. Kenney, Ralph M. Hoyt, John C. Warner, Joseph P. Brazy, Michael J. Dunn, Jr., George P. Ettenheim, and Eugene P. Meyer, Milwaukee; Third: Frank B. Keefe, Oshkosh; Fourth: Oscar L. Wolters, Sheboygan; Fifth: W. R. Graves, Prairie du Chien; Sixth: C. H. Schweizer, La Crosse; Seventh: Walter Melchior, New London; Eighth: Spencer Haven, Hudson; Ninth: Norman Quale, Baraboo, and William Ryan, Madison; Tenth: Alfred S. Bradford, Appleton; Eleventh: Barney B. Barstow, Appleton; Twelfth: William H. Dougherty, Janesville; Thirteenth: E. A. Kletzien, Menomonee Falls; Fourteenth: T. P. Silverwood, Green Bay; Fifteenth: C. E. Lovett, Park Falls; Sixteenth: Francis J. Golden, Merrill; Seventeenth: Eli S. Jedney, Black River Falls; Eighteenth: John P. McGalloway, Fond du Lac; Nineteenth: C. B. Culbertson, Stanley, and Twentieth: Pierre Martineau, Marinette.

GILSON G. GLASIER,
Secretary and Treasurer.

Bar Association of Northwestern Kansas

The Bar Association of Northwestern Kansas held its eighth annual meeting at Goodland, June 13. President W. D. Vance called the Association to order. The invocation was delivered by Reverend C. F. Pohlmann, and the address of welcome was given by Hon. Charles I. Sparks. Responses were made by L. A. McNalley, of Minneapolis, for the Northwestern Kansas

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Bar, by H. W. Stubbs, of Ulysses, President, for the Southwestern Kansas Bar, and by Hon. John S. Dawson, of Topeka, President, for the State Bar of Kansas.

An address on "Some Problems in Probate Jurisdiction" was then delivered by Samuel E. Bartlett, of Ellsworth, after which A. W. Relihan, of Smith Center, spoke on "A Division of the United States District Court for Western Kansas."

At the afternoon session, Mr. A. M. Cowan, of Wichita, spoke on "Integration of the Kansas Bar." A number of other addresses were delivered and followed by general discussion. Reports of standing committees were then received.

The official year was changed to end December 31 instead of June 30. Finances were reported in good condition. The meeting in 1937 will be at Norton. The officers for 1937 are: President, E. E. Euwer, of Goodland; Vice-President, J. F. Bennett, of Norton; Secretary-Treasurer, J. C. Ruppenthal, of Russell.

The big features of the meeting were discussions of integration of the bar, and revision of probate procedure. Austin M. Cowan's address on integration by rule of the Supreme Court was illuminating. Numerous questions by the bar were answered. The general attitude was favorable.

J. C. RUPPENTHAL,
Secretary.